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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 39

MAY DEPARTMENT STORES COMPANY, DOING BUSINESS AS FAMOUS-BARR COMPANY, PETITIONER,

vs.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 21, 1945.

CERTIORARI GRANTED APRIL 9, 1945.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

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vs.

NATIONAL LABOR RELATIONS BOARD

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[fol. a] [Caption omitted]

[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

MAY DEPARTMENT STORES COMPANY, Doing Business as Famous-Barr Company, Respondent

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD—Filed March 14, 1944

The National Labor Relations Board, by its Chief of the Order Section, duly authorized by Section 1 of Article VI, Rules and Regulations of the National Labor Relations Board—Series 3, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of proceedings had before said Board entitled, "In the Matter of May Department Stores Company, doing business as Famous-Barr, and St. Louis Joint Council, United Retail, Wholesale & Department Store Employees of America, C.I.O.," the same being known as Cases Nos. 14-C-872 and R-5331 before said Board, such transcript including the pleadings, testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

R-5331 (14-R-588)

(1) Stenographic transcript of testimony held before Howard Myers, Trial Examiner for the National Labor Relations Board, together with all exhibits introduced in evidence.

(2) Copy of decision and direction of election issued by the National Labor Relations Board, June 16, 1943, together with affidavit of service thereof.

[fol. 2] (3) Copy of respondent's motion to reconsider.

(4) Copy of A. F. of L.'s motion to withhold conducting an election and motion to reconsider order and direction of election.

(5) Copy of amendment to direction of election, dated June 25, 1943.

(6) Copy of order denying above motions, dated June 28, 1943.

(7) Copy of Regional Director's report on ordered election, dated June 30, 1943.

(8) Copy of certification of representatives issued by the National Labor Relations Board, July 12, 1943, together with affidavit of service thereof.

(14-C-872)

(9) Copy of stenographic transcript of testimony held before William E. Spencer, Trial Examiner for the National Labor Relations Board, together with all exhibits introduced into evidence.

(10) Copy of motion for correction of record.

(11) Copy of Trial Examiner's order correcting transcript of testimony, dated October 25, 1943.

(12) Copy of Trial Examiner's Intermediate Report, dated October 28, 1943 (attached to Item 16 hereof).

(13) Copy of order transferring proceeding to the Board, dated October 30, 1943.

(14) Copy of respondent's telegram, dated November 9, 1943, requesting extension of time within which to file exceptions and brief.

(15) Copy of telegram, dated November 10, 1943, granting all parties extension of time within which to file exceptions and brief.

(16) Copy of respondent's exceptions.

(17) Copy of decision and order issued by the National Labor Relations Board, December 17, 1943, with Intermediate Report annexed, together with affidavit of service thereof.

[fol. 3] In Testimony Whereof the Chief of the Order Section of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 10th day of March 1944.

John E. Lawyer, Chief, Order Section, National Labor Relations Board. (Seal.)

National Labor Relations Board.

[File endorsement omitted.]

(Board's Exhibit 1a)

Before the National Labor Relations Board, 14th Region

Case No. XIV R-588

In the Matter of May Department Stores Company, d/b/as Famous-Barr Company and St. Louis Joint Council, United Retail, Wholesale and Department Store Employees of America, (CIO).

Petition of St. Louis Joint Council, United Retail, Wholesale and Department Store Employees of America, (CIO) for Investigation and Certification of Representatives Pursuant to Section 9 (c) of the National Labor Relations Act—Filed March 13, 1943

1. Name of employer May Department Stores Company, d/b/as Famous-Barr Company.

2. Address 6th and 7th, Olive and Locust Streets, St. Louis, Missouri.

3. General nature of business Retail department store.

4. Description of the bargaining unit which petitioner claims is appropriate All employees in the busheling [fol. 4] room, second floor, Department 280, and busheling room, basement, Department 281, excluding the second floor foreman and all other employees of the company.

5. Approximate number of employees in such unit 29.

6. Approximate total number of employees in plant or plants involved 5,000.

7. Number or percentage of employees in such unit who have designated or selected petitioner to be their representative for collective bargaining Substantially more than 51%.

8. Who is the present bargaining representative of employees? None.

9. Names, addresses, and affiliation of any other known individuals or labor organizations who claim to represent any of the employees in such bargaining unit None.

10. Is there an existing or recently expired contract and if so give expiration date? No.

11. The undersigned hereby alleges that a question has arisen concerning the representation of the employees in the above bargaining unit, in that: on March 11, 1943, petitioner notified the company that it represents a majority of the employees within the above unit and requested an early reply. To date petitioner has received no word from the company.

The undersigned further alleges that said question concerning representation is a question affecting commerce within the meaning of said act.

The undersigned requests that pursuant to section 9 (c) of the National Labor Relations Act, the National Labor Relations Board investigate such controversy and certify to the parties the name or names of the representatives that have been designated or selected by said employees.

Name and address of employees or representatives filing the petition. (If made by a labor organization, give also the full name, local number and affiliation of the organiza-
[fols. 5-6] tion and the name and official position of the person acting for the organization.)

St. Louis Joint Council, United Retail, Wholesale and Department Store Employees of America (CIO), by Emanuel Boggs, Joint Council Representative, 924 Central National Bank Building, 705 Olive St., St. Louis, Missouri, Tel: CH 7157 and CH 9548.

Subscribed and sworn to before me this 13th day of March, 1943, at St. Louis, Missouri. Ross M. Madden, Regional Director. (Seal.)

National Labor Relations Board.

[fol. 7] (Board's Exhibit 4)

BEFORE THE NATIONAL LABOR RELATIONS BOARD, FOURTEENTH REGION

In the Matter of

THE MAY DEPARTMENT STORES COMPANY, d/b/as Famous-Barr Company

and

ST. LOUIS JOINT COUNCIL, UNITED RETAIL, WHOLESALE AND DEPARTMENT STORE EMPLOYEES OF AMERICA, CIO

Case No. XIV-R-588

MOTION OF AMERICAN FEDERATION OF LABOR AND ITS AFFILIATED INTERNATIONAL UNIONS FOR LEAVE TO INTERVENE

Now comes the American Federation of Labor and its affiliated International Unions, Intervenor, by Joseph A. Padway and Robert A. Wilson, attorneys for said Intervenor, and by E. P. Theiss, its representative, and moves the Board for leave to intervene in the above-entitled proceeding. As reasons for said motion Intervenor states as follows:

(1) Intervenor, through its representative, E. P. Theiss, and his assistants, has been since September, 1941, and is at the present engaged in an organizing campaign among the employees of the respondent company, said campaign being conducted on an industrial basis, said Intervenor seeking to organize said employees of the said respondent company into a bargaining unit consisting of all the employees of said company, excluding supervisory and man-[fol. 8] agerial employees, and excluding all employees under agreement with the labor organizations having agreements with the said company, in bargaining units composed of well-established craft units in department store operations.

(2) The said organizing campaign has been a very active campaign, and a great deal of time, effort and money has been expended by the said Intervenor through its representatives in attempting to organize the employees of the respondent company in the above described unit.

(3) During the course of the said organizing campaign, the said Intervenor has secured a large number of signed application cards and oral commitments. The said Intervenor expects and hopes soon to petition the National Labor Relations Board for investigation and certification as a bargaining representative of the employees in the above described unit, although said Intervenor has not as yet been able to obtain sufficient commitments to merit the filing of such a petition at the present time, though such a petition will be filed in the near future.

(4) The unit alleged to be appropriate by the petitioning unit in the above entitled proceeding is inappropriate. The petitioning union has attempted and is attempting to organize the employees of the respondent company on an industrial basis, has been unsuccessful in its organizing campaign, has on a previous occasion unsuccessfully attempted to be certified as the bargaining representative of a pseudo industrial unit, and now seeks a unit which is arbitrary and adopted for convenience and expediency. If the alleged appropriate unit claimed by petitioner in the above proceeding is granted, it will operate to preclude organizing activities in an appropriate industrial unit and will further operate through the use of such arbitrary, unreasonable, artificial and inappropriate unit to prevent Intervenor from obtaining bargaining rights in the appropriate industrial bargaining unit in which it has been carrying on its organizational campaign since September 1941, as aforesaid.

[fol. 9] Wherefore, Intervenor respectfully requests permission to intervene in the above proceeding and to participate fully therein as if a party thereto.

Joseph A. Padway, Robert A. Wilson, Attorneys for Intervenor. E. R. Theiss, Representative for Intervenor.

Subscribed and Sworn to before me this 7 day of May, 1943. Charles K. Hackler, Field Attorney, N. L. R. B., St. Louis, Mo. National Labor Relations Board. (Seal.)

BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of

THE MAY DEPARTMENT STORES COMPANY, doing business as FAMOUS AND BARR COMPANY

and

ST. LOUIS JOINT COUNCIL, UNITED RETAIL, WHOLESALE AND DEPARTMENT STORE EMPLOYEES OF AMERICA, CIO

Case No. R-5331

Messrs. Milton H. Tucker and Robert T. Burch, of St. Louis, Mo., for the Company.

Mr. Victor B. Harris, of St. Louis, Mo., for the CIO.

Mr. Joseph A. Padway, by Mr. Robert A. Wilson, of Washington, D. C., for the A. F. of L.

Mr. Wallace E. Royster, of counsel to the Board.

DECISION AND DIRECTION OF ELECTION—Docketed June 16, 1943, National Labor Relations Board

STATEMENT OF THE CASE

Upon a petition duly filed by St. Louis Joint Council, United Retail, Wholesale & Department Store Employees of America, CIO, herein called the CIO, alleging that a [fol. 10] question affecting commerce had arisen concerning the representation of employees of The May Department Stores Company, doing business as Famous and Barr Company, St. Louis, Missouri, herein called the Company, the National Labor Relations Board provided for an appropriate hearing upon due notice before Howard Meyers, Trial Examiner. Said hearing was held at St. Louis, Missouri, on May 7 and 8, 1943. The Company, the CIO, and the American Federation of Labor and its affiliated International Unions, herein collectively called the A. F. of L., appeared, participated, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. The Trial Examiner's rulings made at the hearing are free from prejudicial error and are hereby affirmed. During the hearing both the A. F. of L. and the Company moved for the

dismissal of the petition. For reasons appearing in Section IV, infra, these motions are denied. All the parties have filed briefs which the Board has considered.

Upon the entire record in the case, the Board makes the following:

Findings of Fact

I. The business of the Company

The May Department Stores Company is a New York corporation owning and operating department stores in several States. In St. Louis the Company does business under the trade name of Famous and Barr Company and it is with the employees of the St. Louis store that we are here concerned. During 1942 the Company purchased merchandise for its St. Louis store of a value of approximately $27,000,000, of which approximately 70 per cent was shipped to that store from points outside Missouri. During the same year, sales of the St. Louis store exceeded $27,000,000, of which approximately 12 per cent was shipped by the Company from the St. Louis store to points outside Missouri. While the Company does not concede the jurisdiction of the Board, on the basis of the above stipulated facts we find that the Company is engaged in commerce within the meaning of the National Labor Relations Act.

[fol. 11] II. The organizations involved

St. Louis Joint Council, United Retail, Wholesale & Department Store Employees of America, is a labor organization affiliated with the Congress of Industrial Organizations. The Joint Council represents various locals of United Retail, Wholesale & Department Store Employees of America, in St. Louis which admit to membership employees of the Company.

American Federation of Labor and its affiliated International Unions are labor organizations admitting to membership employees of the Company.

III. The question concerning representation

On March 11, 1943, the CIO wrote the Company stating that it represented a majority of the employees in the busheling department in the St. Louis store and requesting an appointment for a bargaining conference. On March

13, 1943, the Company acknowledged receipt of the CIO letter and stated that it would submit the question to its legal counsel. No further communication has been received from the Company. At the hearing the Company refused to recognize the CIO as the representative of the employees within the claimed unit.

A statement of the Regional Director, introduced into evidence at the hearing and a statement of the Trial Examiner made at the hearing, indicates the membership of the CIO and the A.F. of L. in the unit hereinafter found appropriate.[1]

We find that a question affecting commerce has arisen concerning the representation of employees of the Company within the meaning of Section 9(c) and Section 2 (6) and (7) of the Act.

IV. The appropriate unit

[fol. 12] In its petition the CIO requests a unit of all employees in the busheling room, second floor, department 280, and bushelman room, basement department 281, excluding the second floor foreman and all other employees of the Company. The A.F. of L. and the Company oppose this unit and both contend essentially for a unit embracing all employees in the main store, the St. Charles Street warehouse, and the Pine Street warehouse of the Company, including regular extra, part-time, and seasonal employees.

The Company has two busheling departments in its store located on the second floor and in the basement. The em-

[1] The Regional Director stated that the CIO submitted 25 cards, of which 24 bore apparently genuine original signatures of persons whose names appear on the Company's pay roll of May 4, 1943. The cards were dated from September 29, 1942 to October 14, 1942. The pay roll contains the names of 30 persons within the appropriate unit.

The Trial Examiner stated that the A.F. of L. submitted 188 signed cards designating either the American Federation of Labor or the American Federation of Labor and its affiliated International Union; 103 cards bore the apparently genuine original signatures of persons whose names appear on the Company's pay roll of May 7, 1943. None of the cards submitted by the A.F. of L. contained the name of a person within the appropriate unit.

ployees in these departments fit and alter men's clothing purchased in the store and are designated as fitters, markers, tailors, pressers, and finishers. Their work traditionally has been regarded as a skilled trade. For some years prior to 1920, employees doing such work for this Company were members of a craft union which for a period was party to a collective bargaining contract with an employers' association. The Company was a member of this association and its busheling department employees were covered by the contract. Since 1920 the Company has recognized no union as the representative of these employees, although for many years the Company has recognized craft unions, as the representative of teamsters, electricians, carpenters, painters, and upholsterers; and substantially all the employees working in the Company's Spring Avenue warehouse are represented by A.F. of L. unions.

On November 6, 1942, the CIO, filed a petition requesting a unit of the Company's selling employees. The Company and the A.F. of L. opposed the unit requested on the ground that it was not sufficiently inclusive. At the hearing the parties agreed on an essentially industrial unit but the Company and the A.F. of L. contended for further inclusions, among them regular extra, part-time, and seasonal employees. The Board, without making a final determination of a unit, was of the opinion that regular extra employees should be included in the unit and dismissed the [fol. 13] petition for failure of the CIO to make a substantial showing of membership in the unit thus constituted.[2]

All the parties agree that the optimum unit would include substantially all non-supervisory employees of the Company. The Company and the A. F. of L. cite the Arlington Mills case[3] in support of their position that the CIO cannot, consonant with its avowed intention to seek a store-wide unit, presently request certification as bargaining agent for a small portion of the larger unit. However, since the employees involved in the Arlington Mills case did not form a skilled, clearly identifiable, homogeneous group, and since there was no history of bargaining by craft groups with the employer therein, we do not consider the decision in that

[2] Matter of May Department Stores Company d/b/a Famous-Barr Company, 46 N. L. R. B., No. 36.

[3] Matter of Arlington Mills, 31 N. L. R. B. 21.

case to be controlling here. The Company contends further that the unit now sought is inappropriate in that it fails to include employees in the women's alteration department whose skills are similar to the skills of the employees in the unit sought by the CIO. While we agree that the record indicates a high degree of similarity in the work done in the alteration of women's clothing and in the work done in the busheling rooms, the departments are in different sections of the store; there is historically a sharp demarcation between the trades involved; and it does not appear that there is a substantial interchange of personnel between the women's and men's departments. Traditionally, such workers have been represented by separate craft unions.

Assuming, without deciding, that a store-wide, industrial unit will best effectuate the purposes of the Act, we note that no labor organization claims to represent the employees in such a unit. We believe that collective bargaining should be made an immediate possibility for the employees in the busheling rooms without requiring them to await the uncertain date when the employees may be organized in a larger unit. We find accordingly that the employees in the busheling rooms constitute an appropriate unit. However, our finding in this respect does not preclude a later determination at another stage of self-organization that a larger unit is appropriate.[4]

[fol. 14] The CIO would exclude from the unit the foreman in Department 280, second floor busheling room; the Company would exclude the foreman in Department 281, basement busheling room. Both foremen appear to possess substantial supervisory authority and, in accordance with our settled policy in respect to such employees, we shall exclude both foremen from the unit.

The record discloses that 2 non-supervisory employees are regularly employed in the basement busheling department and 26 such employees in the second floor busheling department. During certain sales, as many as 20 employees are employed in the basement department. In conformance with our decision in the prior case, we shall include such of these additional employees as are designated regular extra employees; that is, those who return regularly to such employment when their services are required.

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[4] See Matter of Kansas City Star Company, 47 N. L. R. B., No. 50.

In view of the facts and circumstances outlined above we find that all employees working in the busheling room, second floor, Department 280 and in the busheling room, basement, Department 281, including regular extra employees, but excluding the 2 foremen and all other employees of the Company, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

V. The determinaiton of representatives

Although the A. F. of L. has made no showing of membership among the employees in the unit herein found appropriate, it appears to represent a number of the employees of the Company and is actively engaged in an organizing campaign. Inasmuch as an election is to be held in this group, and since the A. F. of L. has demonstrated an interest in the organization of the Company's employees, we shall accord it a place on the ballot.

We shall direct that the question concerning representation which has arisen be resolved by an election by secret ballot among the employees in the appropriate unit who were employed during the pay-roll period immediately preceding the date of the Direction of Election herein, subject to the limitations and additions set forth in the Direction.

[fol. 15] DIRECTION OF ELECTION

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Section 9, of National Labor Relations Board Rules and Regulations—Series 2, as amended, it is hereby

Directed that, as part of the investigation to ascertain representatives for the purposes of collective bargaining with The May Department Stores Company, doing business as Famous and Barr Company, St. Louis, Missouri, an election by secret ballot shall be conducted as early as possible, but not later than thirty (30) days from the date of this Direction, under the direction and supervision of the Regional Director for the Fourteenth Region, acting in this matter as agent for the National Labor Relations Board, and subject to Article III, Section 10, of said Rules and Regulations, among the employees in the unit found

appropriate in Section IV, above, who were employed during the pay-roll period immediately preceding the date of this Direction, including employees who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off, and including employees in the armed forces of the United States who present themselves in person at the polls, but excluding any who have since quit or been discharged for cause, to determine whether they desire to be represented by St. Louis Joint Council, United Retail, Wholesale & Department Store Employees of America, affiliated with the CIO, or by American Federation of Labor and its affiliated International Unions, for the purposes of collective bargaining, or by neither.

Signed at Washington, D. C., this 16 day of June 1943.

Harry A. Millis, Chairman; Gerard D. Reilly, Member; John M. Houston, Member; National Labor Relations Board. (Seal.)

[fol. 16] AFFIDAVIT OF SERVICE OF DECISION AND DIRECTION OF ELECTION

DISTRICT OF COLUMBIA, ss:

I, Jack McCaleb, being first duly sworn, on oath saith that I am one of the employees of the National Labor Relations Board, in the office of said Board in Washington, D. C.; that on the 16th day of June, 1943, I mailed postpaid, bearing Government frank, by registered mail, a copy of the Decision and Direction of Election to the following named persons, addressed to them at the following addresses:

St. Louis Joint Council, United Retail Wholesale & Department Store Employees of America, CIO, St. Louis, Missouri.

Mr. Victor B. Harris, 1010 Pine Street, St. Louis, Missouri.

May Department Stores Company, d/b/a Famous-Barr Company, St. Louis, Missouri.

Messrs. Milton H. Tucker and Robert T. Burch, 208 N. Broadway, St. Louis, Missouri.

American Federation of Labor and its affiliated International Union, St. Louis, Missouri.

Robert A. Wilson and Joseph A. Padway, Esquires, 736 Bowen Building, Washington, D. C.

Jack McCaleb.

Subscribed and sworn to before me this 16th day of June, 1943. Kathryn B. Harrell, Notary Public, D. C. My commission expires March 1, 1947. (Seal.)

[fol. 17] BEFORE NATIONAL LABOR RELATIONS BOARD

MOTION OF MAY DEPARTMENT STORES COMPANY, D/B/A,/ ETC., FOR RECONSIDERATION OF CASE AND THAT DECISION AND DIRECTION OF ELECTION BE SET ASIDE, ETC.

Comes now the May Department Stores Company, doing business in St. Louis, Missouri as Famous and Barr Company, the Employer, in the above-entitled case, and by its undersigned attorneys moves for a reconsideration of said case and asks that the decision and direction of election entered in said case on the 16th day of June, 1943, be set aside, and that upon such reconsideration the petition of the St. Louis Joint Council, United Retail, Wholesale and Department Store Employees of America, CIO, be dismissed, and as grounds for this Motion states:

1. In the said decision emphasis is placed upon the so-called history of collective bargaining for the claimed unit because,

"For some years prior to 1920, employees doing such work for this Company were members of a craft union which for a period was party to a collective bargaining contract with an employers' association. The Company was a member of this association and its busheling department employees were covered by the contract."

This emphasis, and apparently the basis of the decision, disregards the history of the last twenty-three (23) years. The decision distinguishes this case from the Arlington Mills case, 31 N. L. R. B. 21, and presumably the other decisions of the Board cited in the brief of Employer, on the ground of a history of collective bargaining which ended twenty-three (23) years ago, and without consideration of the history during that intervening period. It

disregards also the fact as shown by the evidence that there was *never* any separate contract or bargaining between this Employer and any union covering the claimed unit. It disregards also the fact that there was no evidence that Department 281, the basement busheling room was included in the contracts prior to 1920; or, if the language quoted above from the decision was intended to be a finding that the employees of the basement busheling room were [fol. 18] covered by those contracts, then that finding is not supported by any evidence in the case.

2. The said decision agrees

"That the record indicates a high degree of similarity in the work done in the alteration of women's clothing and in the work done in the busheling rooms."

but the decision says

"The departments are in different sections of the store."

Said decision ignores the fact that Departments 280 and 281, being the claimed unit, are each in different sections of the store and under different supervision and attached to different selling departments, and that there is no evidence of a substantial interchange of personnel between them. So that on the basis of the finding of similarity of work done, the claimed unit is composed of two of the three similar departments, each in a separate location, each under separate supervision, each attached to a separate selling department. The decision says that traditionally workers on women's and men's clothing have been represented by separate craft unions. The evidence on this subject was with respect to the manufacture of clothing as distinguished from the alterations of clothing which is the work performed in the second floor busheling room and in the basement busheling room and in the women's alteration room.

3. In the case of May Department Store Company 39—N. L. R. B. 471, involving the Denver store of this same Employer, it was held that the employees in the women's alteration department, the fur alteration department and the men's busheling room, all belonged in the same unit. In the decision here involved, it is held that a unit composed of the two men's busheling rooms is appropriate. Thus,

this same Employer is directed to bargain with a unit in one of its stores which has been held to be inappropriate in another of its stores. Likewise in the case of J. L. Brandeis and Sons, 47 N. L. R. B. 82, both men's busheling and women's alteration room employees were included in a unit separate from the rest of the store.

[fol. 19] 4. The announced policy of the petitioning union, as stated in the circular of March 15, 1943 (Intervenors' Exhibit 11), is to file petitions for department by department as it determines to be expedient. There it said

"This is the first of a series of election petitions for the various groups of employes. Others will follow shortly."

In the circular of March 18, 1943 (Intervenors' Exhibit 12), the petitioning union said

"We want to proceed at Famous and Barr unit by unit until the time comes when we can petition for the entire store. Where we will petition next depends upon only one thing. That is which group is ready next."

There are two competing labor organizations seeking to organize the employees in this store. By this decision one of them is granted an election in the unit composed of two departments. There are some 350 departments in this store and if this Employer is to be confronted with elections and separate bargaining for each one or two departments it will be an endless and intolerable interference with store operations, which should not be permitted.

5. The Board held *only recently*, in May Department Stores Company 46 N. L. R. B. 36, (and all the parties agreed) that a store-wide unit is the appropriate unit. *There is no showing of any change in conditions which would justify the Board in adopting the inconsistent position set forth in the present decision,* and which would subject the Company and its employees, as well as the Board, to the possibility of separate elections in each of the 350 departments in the store in accordance with the announced plans of the petitioning union.

6. There is no showing of *any* representation by the petitioning union which is, "St. Louis Joint Council, United Retail, Wholesale and Department Store Employees of America, CIO", as will be seen from Board's Exhibit I from

which it is clear that only the "United Department Store Employees Union" has been designated by any of the employees in the bushéling rooms.

[fol. 20] Wherefore, the Employer prays that the said decision and direction of election be reconsidered and upon such reconsideration that the Petition for Certification be dismissed.

The privilege of an oral argument in support of this Motion is requested.

Milton H. Tucker, Robert T. Burch, Attorneys for Employer.

BEFORE NATIONAL LABOR RELATIONS BOARD

MOTION OF AMERICAN FEDERATION OF LABOR AND ITS AFFILIATED ORGANIZATIONS FOR ORDER DIRECTING WITHHOLDING THE CONDUCTING OF ELECTION, ETC.

Comes now the American Federation of Labor and its Affiliated Organizations (hereinafter called the A. F. of L.) and moves the Board to order the Board's IX Regional Office in St. Louis, Missouri, to withhold the conducting of the election ordered in the above entitled matter for a period of time sufficient to give the Board an opportunity to consider and pass upon the A. F. of L.'s petition to reconconsider the Decision and Direction of Election which is being filed in the above case.

In support of this motion the American Federation of Labor states as follows:

1. The A. F. of L. is filing a Petition for Reconsideration of the Board's Decision and the Direction of Election in the above entitled matter, protesting the decision and direction of election on the basis that it is irreconcilable with other decisions and policies of the Board; is detrimental to the A. F. of L.'s interest, and gives to the C. I. O. an unwarranted and unjust advantage in the organizing of the employees of the Famous Barr Company.

2. Because of the importance of this case, the A. F. of L. feels that the Board should take time to seriously consider the A. F. of L's petition for reconsideration, and this can-

not be done if the Regional Office proceeds with the conduct-
[fol. 21] ing of the ordered election on the presently scheduled date of June 29, 1943.

Respectfully submitted, Joseph A. Padway, Robert A. Wilson, Attorneys for American Federation of Labor.

BEFORE NATIONAL LABOR RELATIONS BOARD

MOTION OF AMERICAN FEDERATION OF LABOR AND ITS AFFILIATED ORGANIZATIONS FOR RECONSIDERATION OF ORDER AND DIRECTION OF ELECTION.

Now comes the American Federation of Labor and its affiliated organizations (hereinafter called the A. F. of L.) and petitions the Board to reconsider its Order and Direction of Election in the above entitled matter. In support of this petition the A. F. of L. submits the following statement:

The A. F. of L. was shocked at the Board's Decision and Direction of Election in this case, and it cannot conceive upon what basis the Board predicates its decision in the light of well established precedents and principles of the Board, and in view of a most recent decision which we shall discuss hereinafter.

In this case the St. Louis Joint Council, United Retail, Wholesale and Department Store Employees of America, CIO (hereinafter we shall call this organization the CIO) petitioned for a small unit comprised of the employees in two busheling departments of the Famous and Barr Department Store while it claimed to represent a majority of the employees in the store-wide unit, which all parties to the case agree to be the most appropriate unit. The A. F. of L. has an interest, and has a representation in this storewide unit, but it has no representation in the small unit comprised of bushelmen, which the CIO is petitioning for in this case. It seems quite obvious, therefore, that the CIO's design in seeking the small unit of bushelmen in which the A. F. of L. admittedly has no representation, is not for the purpose of representing these employees, and obtaining for them the benefits of collective bargaining, but is merely to enhance its organization position in [fol. 22] the store and obtain an advantage over the A. F. of L. in organizing the store on the appropriate storewide

unit. This is supported by the testimony of the CIO's witnesses at the hearing that it had at one time considered petitioning for a unit of bushelmen, but had decided the (busheling departments participating in the decision,) that it would be best not to seek to represent the busheling departments alone, but wait until the store was organized on the basis all parties considered most appropriate. Why this sudden reversal of a former decision, and this burning desire to now represent and provide collective bargaining for these employees?

The Board well knows that an organization, which is able to obtain a foothold among a closely integrated group of employees, such as the employees of the Famous Bar Department Store, obtains a very desirous and advantageous organizing position. If the Board permits its Decision and Direction of Election to stand in the instant case, it will open to the CIO an "inside tract" in the organizing campaign which has been, and is being, actively and vigorously conducted in this store by both organizations,—a position the CIO does not deserve under the facts of this case, and an advantage which will be presented to it by the Board without any precedent, but in contravention of established precedents and principles of the Board.

In so presenting this advantage the Board must necessarily ignore all of its previously established principles of denying a unit selected by a labor organization merely for expediency, convenience, and organizing purposes. National Lead Co. 32 NLRB-697, Lidz Bros. 5 NLRB-757; Roberti Bros. Inc., 13 NLRB-118, and the Board must in fact overrule its decision in the Arlington Mills case. The Board seeks to distinguish the instant case from the Arlington Mills case, but it cannot do so. In its decision the Board states:

". . . employees involved in the Arlington Mills case did not form a skilled, clearly identifiable, homogeneous group, and since there was no history of bargaining by craft groups with the employer therein, . . ."

and thus does not consider the decision in that case to be controlling. This is not according to the facts. The unit [fol. 23] sought by the A. F. of L. in the Arlington Mills case was composed of a skilled, clearly identifiable, homogeneous group, comprising a well established and well recognized craft. Insofar as a history of bargaining is concerned,

surely the Board cannot be serious if it intends to imply a history of bargaining upon which the CIO's petition in the instant case can be supported. There is no evidence of the petitioning union in this case having bargained for the unit it contends is appropriate in this case, either in this store or any other store, nor is there evidence of this unit ever having existed in this store. There is some evidence in the record that more than twenty years ago the [Journey] Tailors Union did bargain for bushelmen with an Association of Department Stores in the St. Louis area, but such an association-wide unit is much different than a bargaining unit comprised of the bushelmen in one isolated department store. Further, that as a result of a strike more than twenty years ago, the unit composed of the busheling departments, in an Association of Department Stores in St. Louis, ceased to exist,—is evidence that the unit was inappropriate because of its inability to survive the strike but also that there is really no history of bargaining that can support the CIO's petition. Certainly the Board cannot jump a period of more than twenty years to seek out a "history" of bargaining to support its decision. But in addition to the fact that the Board's efforts to exhume an ancient history of bargaining to distinguish the instant case from the Arlington Mills case must fail because an examination of the decayed body shows that bargaining was never carried on with one store but with an association, the Board's efforts to distinguish must fail because the Board in the Arlington Mills case did not dismiss the A. F. of L.'s petition on the basis that "the employees involved * * *" did not form a skilled, clearly identifiable, homogeneous group", and because there was "no history of bargaining by craft groups with the employer", but on the basis that "* * * the U. T. W. A. and the T. W. T. A., at the company's plant admit(ted) to membership all the employees of the company, that such organizations are at present (were) engaged in extensive organizational campaigns covering all the employees of the company, that both organizations claim(ed) to represent a substantial number of employees of the company, [fol. 24] who are not in the units urged by them, and that both admit(ted) that the whole plant constitutes(ed) the most appropriate unit."

We repeat that the Board, if it directs an election on the CIO petition in the instant case must reverse the Arling-

ton Mills case, and must abandon those principles stated therein which are quoted above.

But not only is the present decision irreconilable with the Arlington Mills of 1941, but it cannot be reconciled with the Board's decision in the Prudential Insurance Company of America cases Nos. R-5256-5246, inclusive. In these cases, the Board denied the A. F. of L.'s request for small city-wide units among employees of the insurance company's agents (a unit formerly held to be appropriate) and granted the CIO's request for a larger unit on the basis that "All the parties are agreed that the ultimate appropriate bargaining unit on a company's agents is the nation-wide unit for which the company now contends, basing their contentions for smaller units upon the limited extent of organization among the company's agents. The principal issue to be considered therefore in determining the appropriate unit is the extent of self-organization."

Apply this statement made by the Board on June 17th, the day following its decision in the instant case, to the record in the instant case. That record shows that the CIO contends, and has consistently contended, that it has the store organized and that a majority of the employees in the store-wide unit, which it contends to be appropriate, desires the CIO as their bargaining representative. How then can the Board in the face of the CIO's claim of representing the majority of employees in the unit, which it contends to be appropriate, grant to the CIO its request for a smaller unit in the instant case, and on the following day in the Prudential Life Insurance Company deny the A. F. of L.'s petition for a small unit on the basis that the larger, more appropriate unit, is well organized.

The Board must remember that the American Federation of Labor has a vital interest in this case, that it has spent a large sum of money in organizing the employees of this company on a store-wide basis, and that it will be [fol. 25] detrimentally affected, and its whole organizing campaign destroyed if the Board persist in holding the CIO unit to be appropriate in the instant case. If the CIO were the only union involved there might be some justification in the Board's decision, but under the existing circumstances there is no justification for holding the CIO's petition to be appropriate, and the Board's decision is arbitrary and prejudicial to the interest of the A. F. of L.

Joseph A. Padway, Robert A. Wilson, Attorneys for the American Federation of Labor.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of

THE MAY DEPARTMENT STORES COMPANY, doing business as FAMOUS AND BARR COMPANY

and

ST. LOUIS JOINT COUNCIL, UNITED RETAIL, WHOLESALE & DEPARTMENT STORE EMPLOYEES OF AMERICA, CIO

Case No. R-5331

ORDER DENYING MOTION OF AMERICAN FEDERATION OF LABOR, ETC., FOR ORDER DIRECTING WITHHOLDING THE CONDUCTING OF ELECTION, ETC., AND MOTION FOR RECONSIDERATION OF ORDER AND DIRECTION OF ELECTION

The Board having on June 16, 1943, issued a Decision and Direction of Election in the above-entitled proceeding, and thereafter, counsel for the Company having filed a "Motion to Reconsider"; counsel for the American Federation of Labor having filed a "Motion to Reconsider Order and Direction of Election" and a "Motion to Withhold Conducting an Election" and the Board having duly considered the matters,

[fol. 26] It Is Hereby Ordered that the aforesaid Motions be, and they hereby are, denied.

Dated, Washington, D. C., June 28, 1943.

By direction of the Board.

John E. Lawyer, Chief, Order Section.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of

THE MAY DEPARTMENT STORES COMPANY, doing business as FAMOUS AND BARR COMPANY

and

ST. LOUIS JOINT COUNCIL, UNITED RETAIL, WHOLESALE & DEPARTMENT STORE EMPLOYEES OF AMERICA, CIO

Case No. R-5331

AMENDMENT TO DIRECTION OF ELECTION

On June 16, 1943, the National Labor Relations Board issued a Decision and Direction of Election in the above-entitled proceeding.[1] Thereafter, American Federation of Labor and its affiliated International Unions requested permission to withdraw its name from the ballot. The request is hereby granted.

It Is Hereby Ordered that the Direction of Election of June 16, 1943, be amended by striking therefrom the words "or by American Federation of Labor and its affiliated International Unions, for the purposes of collective bargaining, or by neither" and substituting therefor the words "for the purposes of collective bargaining."

Signed at Washington, D. C., this 25th day of June, 1943.

Harry A. Millis, Chairman; Gerard D. Reilly, Member; John M. Houston, Member; National Labor Relations Board. (Seal.) J.

[1] 50 N. L. R. B., No. 89.

[fol. 27] BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTEENTH REGION

In the Matter of

MAY DEPARTMENT STORES COMPANY d/b/a FAMOUS-BARR COMPANY

and

ST. LOUIS JOINT COUNCIL, UNITED RETAIL, WHOLESALE & DEPARTMENT STORE EMPLOYEES OF AMERICA, CIO

Case No. R-5331

REPORT ON ORDERED ELECTION

Pursuant to the Rules and Regulations of the National Labor Relations Board (herein called the Board), the undersigned hereby reports that the election heretofore directed by the Board in the above-entitled case was conducted in accordance with the notice of election attached hereto and with the following results:

Approximate number of eligible voters	43
Count of Ballots:	
Total ballots cast	37
Total ballots challenged	0
Total void ballots	0
Total valid votes counted	37
Votes cast for St. Louis Joint Council, United Retail, Wholesale & Department Store Employees of America, CIO	36
Votes cast against St. Louis Joint Council, United Retail, Wholesale & Department Store Employees of America, CIO	1

The counting and tabulating were fairly and accurately done. Statements to such effect from the observers to the election are on file.

The undersigned finds that St. Louis Joint Council, United Retail, Wholesale & Department Store Employees of America, CIO has been designated and selected by a majority of the employees in the bargaining unit found by the Board [fol. 28] in its Decision in this proceeding to be appropriate and recommends that the Board so certify.

Dated at St. Louis, Missouri this 30th day of June, 1943.

Ross M. Madden, 14th Regional Director, National Labor Relations Board.

Before National Labor Relations Board

Certification of Representatives

On June 29, 1943, pursuant to the Decision and Direction of Election issued by the Board herein on June 16, 1943,[1] and Amendment thereto on June 25, 1943, an election by secret ballot was conducted under the direction and supervision of the Regional Director for the Fourteenth Region (St. Louis, Missouri). Thereafter, on June 30, 1943, in accordance with the Rules and Regulations of the Board, a Report on Ordered Election was issued and served upon the parties. No objections to the said report, or to the conduct of the ballot, have been filed by any of the parties. The report shows as follows:

Approximate number of eligible voters	43
Total ballots cast	37
Total ballots challenged	0
Total void ballots	0
Total valid votes counted	37
Votes cast for St. Louis Joint Council, United Retail, Wholesale & Department Store Employees of America, CIO	36
Votes cast against St. Louis Joint Council, United Retail, Wholesale & Department Store Employees of America, CIO	1

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Sections 9 and 10, of National Labor Relations Board Rules and Regulations—Series 2, as amended,

It Is Hereby Certified that St. Louis Joint Council, United Retail, Wholesale & Department Store Employees [fol. 29] of America, CIO, has been designated and selected by a majority of all employees working in the busheling room, second floor, Department 280 and in the busheling room, basement, Department 281, including regular extra employees of The May Department Stores Company, doing business as Famous and Barr Company, St. Louis, Missouri, but excluding the 2 foremen and all other employees

[1] 50 N. L. R. B., No. 89.

of the Company, as their representative for the purposes of collective bargaining, and that, pursuant to Section 9 (a) of the Act, the said organization is the exclusive representative of all such employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

Signed at Washington, D. C., this 12 day of July, 1943. Harry A. Millis, Chairman; Gerard D. Reilly, Member; John M. Houston, Member; National Labor Relations Board. (Seal.) J.

BOARD'S EXHIBIT 1-A

BEFORE THE NATIONAL LABOR RELATIONS BOARD, 14TH REGION

In the Matter of

MAY-DEPARTMENT STORES COMPANY, Doing Business As Famous-Barr Company

and

ST. LOUIS JOINT COUNCIL, UNITED RETAIL, WHOLESALE & DEPARTMENT STORE EMPLOYEES OF AMERICA, CIO

Case No. 14 C-872

CHARGE—Filed September 3, 1943

Pursuant to Section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that May De- [fol. 30] partment Stores Company, d/b/a Famous-Barr Company at 6th and 7th, Olive and Locust Streets, St. Louis, Missouri, employing 5000 workers in retail department store has engaged in and is engaging in unfair labor practices within the meaning of Section 8 subsections (1) and (5) of said Act, in that

1. The company, by its officers and agents and representatives, on July 19, 1943 and at all times thereafter, upon request refused to bargain collectively with the authorized representatives of St. Louis Joint Council, United Retail, Wholesale & Department Store Employees of America, CIO, a labor organization within the meaning of Section

2, sub-section (5) of the said Act. Although said labor organization was, on July 12, 1943, certified by the National Labor Relations Board in Case No. R-5331, as the exclusive representative of all employees working in the busheling room, second floor, department 280, and in the busheling room, basement, department 281, including regular extra employees of the company, but excluding the two foremen and all other employees of the company, for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment; and did thereafter take steps to unilaterally effectuate changes with respect to wages, hours and working conditions of the employees embraced within the above described unit.

2. By the above acts and by other acts and conduct, the company, by its officers, agents and representatives has interfered with, restrained and coerced and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed under Section 7 of the Act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the full name, local number and affiliation of organiza-
[fol. 31] tion, and name and official position of the person acting for the organization.)

St. Louis Joint Council, United Retail, Wholesale & Department Store Employees of America, CIO. By: Emanuel Boggs, Joint Council Representative, 924 Central National Bank Building, 705 Olive Street, St. Louis, Missouri.

Subscribed and sworn to before me this 3rd day of Sept., 1943 at St. Louis, Missouri. Jack G. Evans, Regional Attorney. National Labor Relations Board. (Seal.)

BOARD'S EXHIBIT 1-B

BEFORE THE NATIONAL LABOR RELATIONS BOARD,
FOURTEENTH REGION

In the Matter of

MAY DEPARTMENT STORES COMPANY, Doing Business As Famous-Barr Company

and

ST. LOUIS JOINT COUNCIL, UNITED RETAIL, WHOLESALE & DEPARTMENT STORE EMPLOYEES OF AMERICA, CIO

Case No. 14-C-872

COMPLAINT

It having been charged by St. Louis Joint Council, United Retail, Wholesale and Department Store Employees Union of America, affiliated with the Congress of Industrial Organizations, hereinafter called the union, that May Department Stores Company, a corporation, doing business as Famous-Barr Company, hereinafter called the respondent, has engaged in and is now engaging in certain unfair labor practices affecting commeree, as set forth and defined in the National Labor Relations Act, 49 Stat. 449, herein- [fol. 32] after called the Act, the National Labor Relations Board, by the Regional Director of the Fourteenth Region, as agent for the National Labor Relations Board, designated by the National Labor Relations Board Rules and Regulations, Series 2, as amended, for its Complaint against respondent, hereby alleges the following:

1. Respondent is now and at all times material hereto has been a corporation organized under and existing by virtue of the laws of the State of New York, having its principal office and place of business in the City of St. Louis, State of Missouri.

2. Respondent is now and at all times material hereto, has been engaged in business at its retail department store at Sixth, Seventh, Olive and Locust Streets, St. Louis, Missouri, hereinafter called the store, in purchasing, receiving, processing, repairing, selling and distributing a general line of department store goods and merchandise.

3. Respondent, in the course and conduct of its business and in the operations of the store, causes and has continuously caused large quantities of goods and merchandise to be purchased and transported in interstate commerce from and through states of the United States other than the State of Missouri to the store (during the calendar year 1942 the respondent purchased and transported approximately $27,000,000 worth of such goods and merchandise, approximately 70 per cent of which was purchased and transported from points outside the State of Missouri to the store); and causes and has continuously caused large quantities of such goods and merchandise to be sold and transported in interstate commerce to, into, and through states of the United States other than the State of Missouri (during the calendar year 1942 respondent sold and transported such goods and merchandise in excess of $27,000,000, of which approximately 12 percent was transported from the store to points outside the State of Missouri.)

4. St. Louis Joint Council, United Retail, Wholesale and Department Store Employees Union of America, CIO, is a labor organization within the meaning of Section 2, subsection (5) of the Act.

[fol. 33] 5. A unit consisting of all employees, engaged by respondent at its store, in the busheling room, second floor, Department 280, and in the busheling room, basement, Department 281, including regular extra employees but excluding the two foremen and all other employees of the company, hereinafter called the unit, will insure to employees the full benefit of their right to self-organization and will otherwise effectuate the policies of the Act and is a unit found by the Board in its Decision and Direction of Election in the matter of The May Department Stores Company, doing business as Famous and Barr Company and St. Louis Joint Council, United Retail, Wholesale & Department Store Employees of America, CIO, Case No. R-5331 to be appropriate for the purpose of collective bargaining within the meaning of Section 9, subsection (b) of the Act.

6. The union has been designated and selected by a majority of all the employees in the unit as their exclusive representative for purposes of collective bargaining pur-

suant to an election conducted by the Board June 29, 1943 and Certification of Representatives issued July 12, 1943, in connection with Case No. R-5331, referred to in paragraph 5 hereof.

7. On or about July 8, 1943, and at various times thereafter, down to and including the date of issuance of this Complaint, while respondent was engaged at the store, as described above, the union requested respondent, through its officers and agents, to bargain collectively with respect to rates of pay, wages, hours of employment and other conditions of employment with the union as the exclusive representative of all the employees in the unit. On said date and thereafter, the respondent did refuse and fail and does now refuse and fail to bargain collectively with the union in that respondent did refuse and fail and does now refuse and fail to recognize the union as the exclusive bargaining representative as set forth in paragraphs 5 and 6 hereof; did refuse and fail and does now refuse and fail to negotiate with the union as to wages, rates of pay, hours of employment or other conditions of employment of the employees in the unit; from on or about August [fol. 34] 31, 1943, did take steps unilaterally to secure the necessary approval by the National War Labor Board of certain changes with respect to such wages, rates of pay, hours of employment and other conditions of employment of the employees in the unit; and did on or about September 1, 1943 seek to undermine the union's majority representation in the unit by informing all employees engaged at its store that respondent had unilaterally taken such steps and intended in the future to take other steps to secure necessary approval of the National War Labor Board therefor.

8. Respondent, by the acts set forth in paragraph 7 above, and each of them, did engage in, and is engaging in, unfair labor practices within the meaning of Section 8, subsection (5) of the Act.

9. From on or about August 31, 1943, respondent, by its officers, agents and employees, while engaged at the store, as described above, did take steps unilaterally to secure the necessary approval of the National War Labor Board of certain changes with respect to wages, rates of pay, hours of employment and other conditions of employ-

ment of the employees in the unit; and did on or about September 1, 1943, seek to undermine the union's majority representation in the unit by informing all employees engaged at its store that respondent had unilaterally taken such steps and intended in the future to take other steps to secure necessary approval of the National War Labor Board therefor.

10. By the acts set forth in paragraphs 7 and 9 above, and each of them, respondent did interfere with, restrain, and coerce, and is now interfering with, restraining, and coercing its employees in the exercise of rights guaranteed them in Section 7 of the Act.

11. By the acts set forth in paragraphs 7 and 9 above, and each of them, respondent did engage in and is engaging in unfair labor practices within the meaning of Section 8, subsection (1) of the Act.

12. The acts of respondent set forth in paragraphs 7 and 9 above, and each of them, occurring in connection with the operations of respondent described in paragraphs 2 and 3 above, have a close, intimate, and substantial re- [fol. 35] lationship to trade, traffic and commerce among the several states and have led to and tend to lead to labor disputes, burdening and obstructing commerce and the free flow of commerce.

13. The acts of respondent set forth in paragraphs 7 and 9 above, and each of them, constitute unfair labor practices affecting commerce within the meaning of Section 8, subsections (1) and (5), and Section 2, subsections (6) and (7) of the Act.

Wherefore, the National Labor Relations Board by the Regional Director, Fourteenth Region, on this 23rd day of September, 1943, issues its Complaint against the May Department Stores Company, doing business as Famous-Barr Company, respondent herein.

Ross M. Madden, Regional Director, Fourteenth Region, National Labor Relations Board.

BOARD'S EXHIBIT 1-C

BEFORE NATIONAL LABOR RELATIONS BOARD

NOTICE OF HEARING

Please Take Notice that on the 14th day of October, 1943, at 10:00 a. m., Central War Time, in the National Labor Relations Board hearing room, Room 1401 International Building, 722 Chestnut Street, St. Louis, Missouri, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the Complaint attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

A copy of the Charge upon which the Complaint is based is attached hereto.

You are further notified that you have a right to file with the Regional Director for the Fourteenth Region, with offices at 1416 International Building, 722 Chestnut Street, St. Louis, Missouri, acting in this matter as agent of the National Labor Relations Board, an answer to the [fols. 36-37] said Complaint, within ten (10) days from the service thereof.

Please Take Notice that duplicates of all exhibits which are offered in evidence will be required unless, pursuant to request or motion, the Trial Examiner in the exercise of his discretion and for good cause shown, directs that a given exhibit need not be duplicated.

In Witness Whereof the National Labor Relations Board has caused this, its Complaint and Notice of Hearing, to be signed by the Regional Director for the Fourteenth Region on this 23rd day of September, 1943.

Ross M. Madden, Regional Director, National Labor Relations Board.

[fol. 38] BOARD'S EXHIBIT 1-F

BEFORE NATIONAL LABOR RELATIONS BOARD

AMENDED ANSWER OF RESPONDENT, MAY DEPARTMENT STORES COMPANY, D/B/A, ETC., TO COMPLAINT

Comes now the Respondent, May Department Stores Company, doing business in St. Louis, Missouri, as Famous-

Barr Company, and for its amended answer to the complaint herein:

1. Respondent admits the allegations contained in paragraphs numbered 1, 2 and 3 of said Complaint for the purposes of this proceeding.

2. With respect to the allegations of paragraph number 4 of the Complaint, Respondent states that it is without information sufficient upon which to form a belief, and it, therefore, denies that the St. Louis Joint Council, United Retail, Wholesale & Department Store Employees' Union of America, CIO is a labor organization within the meaning of Section 2, subsection (5) of the National Labor Relations Act.

3. Respondent denies the allegations contained in paragraphs numbered 5 and 6 of the said Complaint, except that Respondent admits that the Board conducted an election on June 29, 1943, and that a Certification of Representatives was issued on July 12, 1943, in connection with Case Number R-5331, but denies that the Union has been properly designated and selected by a majority of all the employees in any appropriate unit, as their exclusive representative for purposes of collective bargaining, and denies that the unit described in paragraph numbered 5 is an appropriate unit.

[fols. 39-40] 4. Respondent denies the allegations contained in paragraph number 7 of said Complaint; except that Respondent admits that it has refused to bargain with the petitioning Union.

5. Respondent denies the allegations contained in paragraphs 8, 9, 10, 11, 12 and 13 of said Complaint.

6. For further answer, Respondent states that the Board does not have jurisdiction over this Respondent or its operations, for the reason that the National Labor Relations Act does not confer jurisdiction on the Board over this Respondent or the retail store operations conducted by this Respondent. Respondent further states that the unit with respect to which the complaint alleges a refusal to bargain is not an appropriate unit under any test heretofore prescribed by the National Labor Relations Board, but on the contrary, the finding by the Board that said unit was appropriate is in conflict with every precedent and

standard established by the Board, and that said unit is arbitrary and inappropriate. Respondent further states that the certification of the petitioning Union by the National Labor Relations Board was pursuant to a hearing as a result of which an election was directed for an inappropriate unit, without any showing of representation by the petitioning Union in the unit claimed to be appropriate, and that such action was in violation of the Wagner Act and of the spirit and intent thereof.

Wherefore, Respondent requests that the complaint herein be dismissed.

The May Department Stores Company, doing business as Famous-Barr Company, by Fred Z. Salomon, Vice-President.

Duly sworn to by Fred Z. Salomon. Jurat omitted in printing.

[fol. 41] BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of
MAY DEPARTMENT STORES COMPANY, Doing Business As Famous-Barr Company

and

ST. LOUIS JOINT COUNCIL, UNITED RETAIL, WHOLESALE & DEPARTMENT STORE EMPLOYEES OF AMERICA, CIO

STATEMENT OF EXCEPTIONS OF RESPONDENT, MAY DEPARTMENT STORES COMPANY, D/B/A, ETC.

(Received 10:07 A. M. on Nov. 29, 1943, National Labor Relations Board)

Comes now the Respondent, The May Department Stores Company, doing business as Famous-Barr Company, and [fol. 42] excepts to the following rulings, statements, findings, omissions, conclusions, recommendations, decisions, orders and acts herein, to wit:

I

Respondent excepts to the following rulings of the Trial Examiner at the hearing in the above numbered case:

(1) Respondent excepts to the ruling (Tr. p. 18) admitting in evidence Board's Exhibit 9, the Respondent's application to the National War Labor Board for approval of a salary adjustment, and overruling the Respondent's objection thereto, for the reason that said exhibit is irrelevant to any issue in the case.

(2) Respondent excepts to the ruling (Tr. p. 22) admitting in evidence Board's Exhibit 10, transcript of remarks made by Respondent's Employment Superintendent over the store's public address system on September 1, 1943, and overruling Respondent's objection thereto, for the reason that said exhibit is irrelevant to any issue in the case.

(3) Respondent excepts to the ruling (Tr. p. 24) admitting in evidence excerpts from remarks made by Respondent's Vice President on September 11, 1943, over the store's public address system and overruling Respondent's objection thereto, for the reason that said remarks are irrelevant to any issue in the case, and were outside the scope of the complaint.

(4) Respondent excepts to the ruling (Tr. p. 26) admitting in evidence Board's Exhibit 11, a copy of Store Chat dated September 3, 1943, and overruling Respondent's objection thereto, for the reason that said exhibit is irrelevant to any issue in the case.

II

Respondent excepts to the following rulings, findings, omissions, conclusions and recommendations of the Trial Examiner as set forth in his Intermediate Report filed herein.

(References to the said Intermediate Report are to the mimeograph copy and are cited with the page and line where the beginning of the matter mentioned is found.)

[fol. 43] (5) Respondent excepts to the finding of fact—

"that the respondent is engaged in commerce within the meaning of the Act" (p. 3, l. 2).

Said finding is not supported by the record.

(6) Respondent exeepts to the finding of fact—

"St. Louis Joint Council, United Retail, Wholesale & Department Store Employees of America is a labor or-

ganization affiliated with the Congress of Industrial Organizations. The Joint Council represents in St. Louis various locals of United Retail, Wholesale & Department Store Employees of America which admit to membership employees of the respondent." (p. 3, l. 7)

Said finding is not supported by the record.

(7) Respondent excepts to the finding of fact that there is a

"presumption arising from the certification that the Union is still the representative of the majority of the employees of the respondent in the appropriate unit."(p. 3, l. 40)

Said finding is not supported by the record. And Respondent excepts to the failure to find that there is no evidence that St. Louis Joint Council, United Retail, Wholesale & Department Store Employees of America, CIO, in said Report called "the Union", now represents or has ever represented any employee of the Respondent.

(8) Respondent excepts to the finding of fact—

"that all employees of the respondent at the St. Louis store engaged in the busheling room, second floor, department 280, and in the busheling room, basement, department 281, including regular extra employees but excluding the two foremen and all other employees of the company, constitute and at all times material herein constituted a unit appropriate for the purposes of collective bargaining." (p. 3, l. 44)

Said finding is not supported by the record and is contrary to the facts shown by the record, and to all prior decisions of the Board.

[fol. 44] (9) Respondent excepts to the finding of fact that—

"on and at all times after July 12, 1943, the Union was the duly designated bargaining representative of a majority of the employees in the aforesaid appropriate unit, and that, pursuant to the provisions of Section 9(a) of the Act, the Union was on July 12, 1943, and at all times thereafter has been, and is now the exclusive representative of all employees in the aforesaid unit for the purposes of

collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment." (p. 3, l. 50).

Said finding is not supported by the record and is contrary to the facts shown by the record.

(10) Respondent excepts to the finding of fact that the Respondent by refusing to bargain with the Union,

"has thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act." (p. 4, l. 47)

Said finding is not supported by the record.

(11) Respondent exceptes to the failure to find, in connection with the finding that the Respondent made application to the National War Labor Board for approval of a voluntary salary adjustment affecting the salaries of some 4530 employees engaged in its St. Louis operations, that said application was for a general increase of $2.00 per week to all full-time employees, and proportionate increases to all short-hour employees, except certain designated craftsmen, and that the reason for the increase, as stated in said application, was to eliminate substandards of living in the lower salary brackets and to maintain the present payroll differentials and that said application showed that the payroll differentials were in most cases only fifty cents or one dollar per week. And Respondent excepts to the failure to find that, under the provisions of the form supplied by the National War Labor Board for the filing of applications for approval of a voluntary salary adjustment and the regulations applying thereto, the Respondent was not required to make any statement with respect to the Union.

[fol. 45] (12) Respondent excepts to the finding of fact that—

"It logically follows that the respondent's action in ignoring the Union while attempting to win approval of its proposal for wage increases, and in publishing the facts of its unilateral action to its employees, including employees represented by the Union, had the effect of depriving the Union of credit which normally would accrue to it, and of nullifying its efficacy as a bargaining agent." (p. 4, l. 51)

Said finding is not supported by the record.

13) Respondent excepts to the finding of fact that—

"The said action may, therefore, reasonably be said to have undermined the Union among employees for whom it had been certified as bargaining representative, and to have discouraged employees generally in their union affiliation." (p. 4, l. 57)

Said finding is not supported by the record.

(14) Respondent excepts to the finding of fact that—

"Were the respondent successful in obtaining approval of its proposed wage adjustments, under the circumstances of the war emergency, this might result in the Union being foreclosed for an indefinite period from effective bargaining with reference to the wages of employees for whom it had been certified as bargaining representatives." (p. 4, l. 60)

Said finding is not supported by any evidence. And Respondent excepts to the failure to find that there was no evidence that approval of the National War Labor Board could be obtained for a salary increase for the employees of Respondent's busheling rooms as a separate unit, as distinguished from the application which the Respondent filed for all the employees of the store to eliminate substandards of living in the lower salary brackets and to maintain the present payroll differentials, and that in the absence of any evidence it is reasonable to presume that the tailors, pressers and other employees of the busheling rooms, as a separate unit, could not be granted such a salary increase.

[fol. 46] (15) Respondent excepts to the finding of fact that—

"Nor could the respondent through unilateral action place the Union in a position where it would be required to request the National War Labor Board's deletion of employees it represented from respondent's application, or assert its approval thereof, in order to maintain a semblance of authority as bargaining representative." (p. 5, l. 3)

Said finding is not supported by the record.

(16) Respondent excepts to the finding of fact that—

"No justification for the respondent's unilateral actions, set forth above, is found in its contesting of the appropriateness of the unit and the Union's certification therein, since it gains no immunity for engaging in unfair labor practices until such time as ultimate adjudication of the matter has been reached in the courts. 'An order of the Board is final and binding upon the parties thereto unless reversed upon appropriate judicial review.'" (p. 5, l. 8)

Said finding is not supported by the record. And Respondent excepts to the failure to find that Respondent's action in including the employees of the busheling rooms, approximately 40 in number, in its application to the National War Labor Board covering approximately 4530 employees, which disclosed the claimed interest of the Union and afforded to the Union a means of excluding the said employees of the busheling rooms from said application if the Union chose to take that action, was not an unfair labor practice, but was entirely fair and reasonable and was the only fair and appropriate way in which the Respondent could apply for approval of a salary increase for all the employees of its store, which it had a legal right to do, and maintain its legal right to contest the certification of the Union as the exclusive bargaining representative of the employees of the busheling rooms, and to contest the decision that said employees constituted an appropriate unit, or that the petitioning Union had made a sufficient showing of representation to justify an election.

(17) Respondent excepts to the finding of fact that—

[fol. 47] "by its unilateral action in seeking approval of its proposed wage adjustments, and by statements of its officers and its publication *Store Chat* addressed to employees concerning said unilateral action, the respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act." (p. 5, l. 16)

Said finding is not supported by any evidence and is contrary to the facts shown by the record.

(18) Respondent excepts to the finding of fact that—

"The activities of the respondent as set forth in Section III above, occurring in connection with the operations of the respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce." (p. 5, l. 26)

Said finding is not supported by the record.

(19) Respondent excepts to the finding that—

"Since it has been found that the respondent has engaged in unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act." (p. 5, l. 35)

Said finding is not supported by the record.

(20) Respondent excepts to the finding that—

"Since it has been found that the respondent has refused to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit, it will be recommended that the respondent, upon request, bargain collectively with the Union." (p. 5, l. 40)

Said finding is not supported by the record.

(21) Respondent excepts to the conclusion of law numbered "1." (p. 5, l. 50). Said conclusion is not supported or justified by the record.

[fol. 48] (22) Respondent excepts to the conclusion of law numbered "2." (p. 5, l. 55). Said conclusion is not supported or justified by the record.

(23) Respondent excepts to the conclusion of law numbered "3." (p. 6, l. 1). Said conclusion is not supported or justified by the record.

(24) Respondent excepts to the conclusion of law numbered "4." (p. 6, l. 8). Said conclusion is not supported or justified by the record.

(25) Respondent excepts to the conclusion of law numbered "5." (p. 6, l. 16). Said conclusion is not supported or justified by the record.

(26) Respondent excepts to the conclusion of law numbered "6." (p. 6, l. 21). Said conclusion is not supported or justified by the record.

(27) Respondent excepts to the recommendation of the Trial Examiner numbered "1. (a)". (p. 6, l. 35). Said recommendation is not supported or justified by the record.

(28) Respondent excepts to the recommendation of the Trial Examiner numbered "1. (b)" (p. 6, l. 43). Said recommendation is not supported or justified by the record.

(29) Respondent excepts to the recommendation of the Trial Examiner numbered "2. (a)" (p. 6, l. 53). Said recommendation is not supported or justified by the record.

(30) Respondent excepts to the recommendation of the Trial Examiner numbered "2. (b)" (p. 6, l. 61). Said recommendation is not supported or justified by the record.

(31) Respondent excepts to the recommendation of the Trial Examiner numbered "2. (c)" (p. 7, l. 7). Said recommendation is not supported or justified by the record.

(32) Respondent excepts to the following recommendation of the Trial Examiner:

"It is further recommended that unless on or before ten (10) days from the receipt of this Intermediate Report, the respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the [fol. 49] National Labor Relations Board issue an order requiring the respondent to take the action aforesaid." (p. 7, l. 12)

Said recommendation is not supported or justified by the record.

III

Respondent excepts to the following rulings, findings, conclusions, orders, directions and acts in the matter of The May Department Stores Company, doing business as Famous And Barr Company, and St. Louis Joint Council, United Retail, Wholesale & Department Store Employees of America, CIO, Case No. R-5331, to wit:

(33) Respondent excepts to the following findings of fact contained in the Decision and Direction of Election entered in said case, dated the 16th day of June, 1943:

(a) To the finding that the Company is engaged in commerce within the meaning of the Act. Said finding is not supported by the record.

(b) To the finding that the St. Louis Joint Council, United Retail, Wholesale & Department Store Employees of America, is a labor organization. Said finding not supported by the record.

(c) To the finding that the Joint Council represents various locals of the United Retail, Wholesale and Department Store Employees of America in St. Louis. Said finding is not supported by the record.

(d) To the finding:

"A statement of the Regional Director, introduced into evidence at the hearing and a statement of the Trial Examiner made at the hearing, indicates the membership of the CIO and the A. F. of L. in the unit hereinafter found appropriate.[1]

(Decision and Direction of Election, p. 2.)

[fol. 50] Said findings are not supported by any evidence. And Respondent excepts to the failure to find, that not one employee of the Respondent was a member of the St. Louis Joint Council, United Retail, Wholesale & Department Store Employees of America, CIO, in said Decision and Direction of Election called "the CIO"; and to the failure to find that the employees of the Respondent were not eligible for membership in said St. Louis Joint Council and that not one employee had designated said St. Louis Joint Council as his representative for collective bargaining, or for any other purpose.

(e) To the finding that a question affecting commerce has arisen concerning the representation of employees of the Company within the meaning of Section 9 (c) and Section 2 (6) and (7) of the Act. Said finding is not supported by the record.

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[1] The Regional Director states that the CIO submitted 25 cards, of which 24 bore apparently genuine original signatures of persons whose names appear on the Company's pay roll of May 4, 1943. The cards were dated from September 29, 1942 to October 14, 1942. The pay roll contains the names of 30 persons within the appropriate unit."

(f) To the finding that the work of the employees in the busheling rooms traditionally has been regarded as a skilled trade. Said finding is not supported by the record. And to the failure to find that the same kind and degree of skill required by the employees in the busheling rooms is also required by the employees in the Respondent's departments engaged in the alteration of women's clothing.

(g) To the finding, "On November 6, 1942 the CIO filed a petition requesting a unit of the Company's selling employees." Said finding is not supported by any evidence. And Respondent excepts to the failure to find that said unit was not limited to the Company's selling employees.

(h) To the finding that there is historically a sharp demarcation between the trades involved in the busheling rooms and in the women's alteration departments and that it does not appear that there is a substantial interchange of personnel between said departments and that traditionally such workers have been represented by separate craft unions. Said findings are not supported by the record, but are contrary to the facts shown by the record.

(i) To the finding that the employees in the busheling rooms constitute an appropriate unit. Said finding is not supported by any evidence and is contrary to the facts [fol. 51] shown by the record and to the prior decisions of the Board.

(j) To the finding that no labor organization claims to represent the employees in a store-wide unit. Said finding is not supported by the record. And Respondent excepts to the failure to find that Local 372, United Retail, Wholesale & Department Store Employees of America, CIO, claims to represent the employees in such a unit and has so claimed since prior to the filing of the petition in said case.

(k) To the finding:

"In view of the facts and circumstances outlined above we find that all employees working in the busheling room, second floor, Department 280 and in the busheling room, basement, Department 281, including regular extra employees, but excluding the 2 foremen and all other employees of the Company, constitute a unit appropriate for

the purposes of collective bargaining within the meaning of Section 9 (b) of the Act."

(Decision and Direction of Election, p. 4)

Said finding is not supported by any evidence and is contrary to the facts shown by the record, and is arbitrary, unreasonable, and capricious. And Respondent excepts to the failure to find that Respondent has approximately 350 departments in the store and that the designation of a unit consisting of only one or two of such departments as appropriate would cast an undue and unreasonable burden upon the Respondent.

(34) Respondent excepts to the Direction of Election set forth in said Decision and Direction of Election dated June 16, 1943, for the reason that it is not supported by the record and is contrary to the law under the facts shown by the record, and is inconsistent with the prior decisions of the Board.

(35) Respondent excepts to the Order dated June 28, 1943, denying Respondent's Motion to Reconsider the Decision and Direction of Election dated June 16, 1943. Said order is contrary to the law under the facts shown by the record.

[fol. 52] (36) Respondent excepts to the Certification of Representatives issued by the Board, dated July 12, 1943. Said Certification is contrary to the law under the facts shown by the record.

Dated at St. Louis, Missouri, this 26th day of November, 1943.

The May Department Stores Company, Doing Business as Famous-Barr Company, by Milton H. Tucker, Robert T. Burch, Attorneys.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of

MAY DEPARTMENT STORES COMPANY, Doing Business as Famous-Barr Company

and

ST. LOUIS JOINT COUNCIL, UNITED RETAIL, WHOLESALE & DEPARTMENT STORE EMPLOYEES OF AMERICA, CIO

Case No. 14-C-872

DECISION AND ORDER—December 17, 1943

On October 28, 1943, the Trial Examiner issued his Intermediate Report in the above-entitled proceeding, finding that the respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist from the unfair labor practices found and take certain affirmative action, as set out in the copy of the Intermediate Report attached hereto. Thereafter the respondent filed exceptions to the Intermediate Report and a supporting brief. No request for oral argument before the Board at Washington, D. C., was made by any of the parties. The Board has considered the rulings of the Trial Examiner at the hearing and finds that no prejudicial errors were committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the respondent's brief and exceptions, and the entire record in the case, [fol. 53] and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, May Department Stores Company, doing business as Famous-Barr Company, St. Louis, Missouri, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with St. Louis Joint Council, United Retail & Department Store Employees of America, affiliated with the Congress of Industrial Organi-

zations, as the exclusive representative of all its employees at its St. Louis store engaged in the busheling room, second floor, department 280, and in the busheling room, basement, department 281, including regular extra employees in these departments, but excluding the two foremen and all other employees of the respondent;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative acts which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with St. Louis Joint Council, United Retail & Department Store Employees of America, affiliated with the Congress of Industrial Organizations, as the exclusive representative of all its employees at its St. Louis store engaged in the busheling room, second floor, department 280, and in the busheling room, basement, department 281, including regular extra employees in these departments, but excluding the two foremen and all other employees of the respondent, [fol. 54] with respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Post immediately in conspicuous places at its St. Louis, Missouri, store, and maintain for a period of at least sixty (60) consecutive days from the date of posting notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a) and (b) of this Order; and (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) of this Order;

(c) Notify the Regional Director for the Fourteenth Region in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

Signed at Washington, D. C., this 17 day of December, 1943.

Harry A. Millis, Chairman; John M. Houston, Member, National Labor Relations Board. (Seal.)

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Trial Examining Division, Washington, D. C.

In the Matter of

MAY DEPARTMENT STORES COMPANY, Doing Business as Famous-Barr Company

and

ST. LOUIS JOINT COUNCIL, UNITED RETAIL, WHOLESALE & DEPARTMENT STORE EMPLOYEES OF AMERICA, CIO

Case No. 14-C-872

Mr. Charles K. Hackler, for the Board.

Lewis, Rice, Tucker, Allen & Chubb, by Mr. Milton H. Tucker and Mr. Robert T. Burch, of St. Louis, Mo., for the respondent.

[fol. 55] Mr. Emanuel Boggs, of St. Louis, Mo., for the Union.

Intermediate Report

STATEMENT OF THE CASE

Upon an amended charge duly filed by St. Louis Joint Council, United Retail, Wholesale & Department Store Employees of America, CIO, herein called the Union, the National Labor Relations Board, herein called the Board, by the Regional Director for the Fourteenth Region (St. Louis, Missouri), issued its complaint dated September 23, 1943, against May Department Stores Company, doing business as Famous-Barr Company, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint accompanied by notice of hearing were duly served upon the respondent and the Union.

Concerning the unfair labor practices, the complaint alleged in substance: (1) that on June 16, 1943, the Board in its Decision and Direction of Election in Case No. R-5331 [1]

[1] Matter of May Department Stores Company, d/b/a Famous and Barr Company and St. Louis Joint Council, United Retail, Wholesale & Department Store Employees of America, CIO, 50 N. L. R. B. 669.

found that all employees of the respondent at its St. Louis store engaged in the bushfeling room, second floor, department 280, and in the bushfeling room, basement, department 281, including regular extra employees but excluding the two foremen and all other employees of the respondent, constituted a unit appropriate for collective bargaining; (2) that on July 12, 1943, the Board in its Certification of Representatives in the same case, certified the Union as the exclusive representative of all employees in the said unit for the purposes of collective bargaining, and that the Union is still such representative; (3) that on and after July 8, 1943, although requested to bargain collectively by the Union, the respondent has refused to do so; and (4) that by the foregoing acts and conduct, and by attempting to effectuate a unilateral wage increase and by publishing this fact to its employees, the respondent has interfered [fol. 56] with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

In its duly filed answer and amended answer to the Board's complaint, the respondent admitted its refusal to bargain with the Union as representative of the unit which the Board found to be appropriate, and asserted by way of affirmative defense that the Board erred in its finding as to the appropriateness of the unit in question. It furth denied that it had engaged in any of the alleged unfa labor practices.

Pursuant to notice, a hearing was held on October 14, 1943, at St. Louis, Missouri, before the undersigned, the Trial Examiner duly designated by the Chief Trial Examiner. The Board, the respondent, and the Union were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues was afforded all parties. At the close of the hearing, the parties were advised that they might argue orally before and file briefs with the undersigned. Pursuant thereto, the attorney for the Board presented oral argument before, and the respondent filed a brief with the undersigned.

Upon the entire record of proceedings, including Case No. R-5331,[2] the undersigned makes the following:

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[2] See Footnote 1 supra.

Findings of Fact

I. The Business of the Respondent

The May Department Stores Company is a New York corporation owning and operating department stores in several states. In St. Louis, the respondent does business under the trade name of Famous-Barr Company and, at times, Famous and Barr Company. Only employees of the St. Louis store are involved in this proceeding.

The respondent at its St. Louis store is engaged in purchasing, receiving, processing, repairing, selling and distributing a general line of department store goods and merchandise. In the course and conduct of its business and [fol. 57] in the operation of the St. Louis store, it causes and has continuously caused large quantities of goods and merchandise to be purchased and transported in interstate commerce from and through States of the United States, other than the State of Missouri, to its St. Louis store. During the calendar year of 1942, the respondent purchased and transported approximately $27,000,000 worth of such goods and merchandise, approximately 70 per cent of which was purchased and transported from points outside the State of Missouri to the St. Louis store. The respondent causes and has continuously caused large quantities of such goods and merchandise to be sold and transported in interstate commerce to, into and through States other than the State of Missouri. During the calendar year of 1942, the respondent sold and transported such goods and merchandise in excess of $27,000,000, of which approximately 12 per cent was transported from the St. Louis store to points outside the State of Missouri.

On the basis of the foregoing findings of fact, derived from a stipulation of the parties, the undersigned finds that the respondent is engaged in commerce within the meaning of the Act.

II. The labor organizations involved

St. Louis Joint Council, United Retail, Wholesale & Department Store Employees of America is a labor organization affiliated with the Congress of Industrial Organizations. The Joint Council represents in St. Louis various locals of United Retail, Wholesale & Department Store Employees of America which admit to membership employees of the respondent.

III. The unfair labor practices

A. *The refusal to bargain*

1. The appropriate unit and representation by the Union of a majority therein.

On June 16, 1943, the Board issued its Decision and Direction of Election in Case No. R-5331 (50 N. L. R. B. 669), in which it found that all employees of the respondent at its St. Louis store engaged in the busheling room, second floor, department 280, and in the busheling room, basement, de- [fol. 58] partment 281, including regular extra employees but excluding the two foremen and all other employees of the respondent, constituted a unit appropriate for the purposes of collective bargaining. On June 29, 1943, an election was held, pursuant to the said Direction of Election. On June 30, 1943, the Regional Director issued and served upon the parties an Election Report with respect to the balloting. No objections to the said Report or to the conduct of the ballot were filed by any of the parties. On July 12, 1943, the Board in its Certification of Representatives, certified the Union as the representative for the purposes of collective bargaining of the employees in the unit hereinabove referred to.

The respondent contests the appropriateness of the unit, referred to above, and hence the subsequent certification of the Union therefor. No additional evidence to support the respondent's contention was introduced in the present proceeding. Similarly, no evidence was introduced in the present proceeding to rebut the presumption arising from the certification that the Union is still the representative of the majority of the employees of the respondent in the appropriate unit.

The undersigned finds that all employees of the respondent at the St. Louis store engaged in the busheling room, second floor, department 280, and in the busheling room, basement, department 281, including regular extra employees but excluding the two foremen and all other employees of the company, constitute and at all times material herein constituted a unit appropriate for the purposes of collective bargaining. The undersigned further finds that on and at all times after July 12, 1943, the Union was the duly designated bargaining representative of a majority of the employees in the aforesaid appropriate unit, and that, pursuant to the provisions of Section 9 (a) of the Act, the

Union was on July 12, 1943, and at all times thereafter has been, and is now the exclusive representative of all employees in the aforesaid unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

2. The refusal to bargain

On July 8, 1943, the Union requested the respondent to bargain collectively with respect to rates of pay, wages, [fol. 59] hours of employment and other conditions of employment, with the Union as the exclusive representative of all employees in the appropriate unit. On July 19, 1943, the respondent, through its vice president and general manager, Fred J. Salomon, advised the Union by letter of its refusal to recognize the Union and to bargain with it as the representative of its employees. The respondent in its July 19 letter stated, "we do not agree that your organization represents a majority of the employees within an appropriate unit, and we wish to preserve our full rights to question the recent decision of the National Labor Relations Board on that subject as we may see fit." It is clear from respondent's admissions, and the undersigned finds, that at all times since July 19, 1943, the respondent has maintained its position as set forth in its July 19 letter.

The undersigned accordingly finds that the respondent on July 19, 1943, and at all times thereafter, has refused to bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit, and has thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

B. *Interference, restraint, and coercion*

On August 30, 1943, the respondent made unilateral application to the National War Labor Board for "approval of a voluntary wage or salary rate adjustment," affecting the wages or salaries of some 4,530 employees engaged in its St. Louis operations, including employees of the unit represented by the Union, some 40 in number. In a letter attached to its application the respondent stated that certain of its employees, being covered in collective bargaining agreements between the respondent and certain labor organizations, were excluded from the application. The

letter further set forth the facts concerning the Union's certification as bargaining representative, the respondent's refusal to recognize or bargain with it, and the respondent's intention to contest the Union's certification, wherefore the respondent argued that the Union had no interest in the application. The letter provided, however, that if the Union should object to the inclusion in the application [fol. 60] of employees for whom it had been certified as bargaining representative, the application might "be considered as having been amended so as to exclude those employees from the application." The respondent, subsequent to the filing of its application, by speeches of its superintendent of employment, Griffith McCarthy, and its vice president and general manager, Fred J. Salomon, and through its publication, Store Chat, published to its employees, including employees of the unit in which the Union had been certified as bargaining representative, an account of its unilateral efforts and progress in obtaining approval of its proposed wage increases.

The Board and the courts have uniformly held that unilateral action by an employer in the granting of a wage increase, where there is a duly constituted and existing bargaining representative of the employees affected, is in derogation of the union's right to recognition and representation in such matters. It logically follows that the respondent's action in ignoring the Union while attempting to win approval of its proposal for wage increases, and in publishing the facts of its unilateral action to its employees, including employees represented by the Union, had the effect of depriving the Union of credit which normally would accrue to it, and of nullifying its efficacy as a bargaining agent. The said action may, therefore, reasonably be said to have undermined the Union among employees for whom it had been certified as bargaining representative, and to have discouraged employees generally in their union affiliation. Were the respondent successful in obtaining approval of its proposed wage adjustments, under the circumstances of the war emergency, this might result in the Union being foreclosed for an indefinite period from effective bargaining with reference to the wages of employees for whom it had been certified as bargaining representative. Nor could the respondent through unilateral action place the Union in a position where it would be required to request the National War Labor Board's deletion

of employees it represented from respondent's application, or assert its approval thereof, in order to maintain a semblance of authority as bargaining representative. No justification for the respondent's unilateral actions, set forth above, is found in its contesting of the appropriateness of [fol. 61] the unit and the Union's certification therein, since it gains no immunity for engaging in unfair labor practices until such time as ultimate adjudication of the matter has been reached in the courts. "An order of the Board is final and binding upon the parties thereto unless reversed upon appropriate judicial review."[3]

The undersigned finds that, by its unilateral action in seeking approval of its proposed wage adjustments, and by statements of its officers and its publication Store Chat addressed to employees concerning said unilateral action, the respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the respondent as set forth in Section III above, occurring in connection with the operations of the respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Since it has been found that the Respondent has engaged in unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Since it has been found that the respondent has refused to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit, it will be recommended that the respondent, upon request, bargain collectively with the Union.

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[3]Matter of Bear Brand Hosiery Co. and International Brotherhood of Firemen & Oilers, Local 296 (AFL), 46 N. L. R. B. 609.

Upon the basis of the above findings of fact and upon the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. St. Louis Joint Council, United Retail & Department Store Employees of America, affiliated with the Congress [fol. 62] of Industrial Organizations, is a labor organization within the meaning of Section 2 (5) of the Act.

2. All employees of the respondent at its St. Louis store engaged in the busheling room, second floor, department 280, and in the busheling room, basement, department 281, including regular extra employees but excluding the two foremen and all other employees of the respondent, constitute a unit appropriate for collective bargaining, within the meaning of Section 9 (b) of the Act.

3. St. Louis Joint Council, United Retail & Department Store Employees of America, affiliated with the Congress of Industrial Organizations, was on July 12, 1943, and at all times thereafter has been the exclusive representative of all the employees in the aforesaid unit, for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

4. By refusing on June 19, 1943, and at all times thereafter to bargain collectively with St. Louis Joint Council, United Retail & Department Store Employees of America, affiliated with the Congress of Industrial Organizations, as the exclusive representative of all its employees in the aforesaid appropriate unit, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (5) of the Act.

5. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaged in unfair labor practices, within the meaning of Section 8 (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the above findings of fact and conclusions of law, and upon the entire record in the case, the undersigned recommends that the respondent, May Department Stores Company, doing business as Famous-Barr Company, and its officers, agents, successors and assigns shall:

[fol. 63] 1. Cease and desist from:

(a) Refusing to bargain collectively with St. Louis Joint Council, United Retail & Department Store Employees of America, affiliated with the Congress of Industrial Organizations, as the exclusive representative of all its employees at its St. Louis store engaged in the busheling room, second floor, department 280, and in the busheling room, basement, department 281, including regular extra employees but excluding the two foremen and all other employees of the respondent;

(b) In any other manner interfering with, restraining, and coercing its employees in the exercise of the rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act;

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with St. Louis Joint Council, United Retail & Department Store Employee of America, affiliated with the Congress of Industrial Organizations, as the exclusive representative of all its employees at its St. Louis store engaged in the busheling room, second floor, department 280, and in the busheling room, basement, department 281, including regular extra employees but excluding the two foremen and all other employees of the respondent;

(b) Post immediately in conspicuous places at its St. Louis, Missouri, store and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employes stating: (1) that the respondent will not engage in the conduct from which it is recommended

that it cease and desist in paragraph 1 (a) and (b) of these recommendations; and (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) of these recommendations;

(c) Notify the Regional Director for the Fourteenth Region in writing within ten (10) days from the date of the [fol. 64] receipt of this Intermediate Report, what steps the respondent has taken to comply therewith.

It is further recommended that unless on or before ten (10) days from the receipt of this Intermediate Report, the respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondent to take the action aforesaid.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 2—as amended, effective October 28, 1942—any party may within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations, file with the Board, Rochambeau Building, Washington, D. C., an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. As further provided in said Section 33, should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of the order transferring the case to the Board.

William E. Spencer, Trial Examiner.

Dated: October 28, 1943.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

MAY DEPARTMENT STORES COMPANY, Doing Business as Famous-Barr Company, Respondent

PETITION OF NATIONAL LABOR RELATIONS BOARD FOR ENFORCEMENT OF ORDER—Filed March 14, 1944

To the Honorable, the Judges of the United States Circuit [fol. 65] Court of Appeals for the Eighth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U. S. C. §151 et seq.), respectfully petitions this Court for the enforcement of its order against respondent, May Department Stores Company, doing business as Famous-Barr Company, St. Louis, Missouri, and its officers, agents, successors, and assigns. The proceedings resulting in said order are known upon the records of the Board as "In the Matter of May Department Stores Company, doing business as Famous-Barr Company and St. Louis Joint Council, United Retail, Wholesale & Department Store Employees of America, CIO," Cases Nos. 14-C-872 and R-5331.

In support of this petition the Board respectfully shows:

(1) Respondent is a New York corporation, engaged in business in the State of Missouri, within this judicial circuit, where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act.

(2) Upon all proceedings had in said matter before the Board, as more fully shown by the entire record thereof, certified by the Board and filed with this Court herein, to which reference is hereby made, the Board, on December 17, 1943, duly issued an order directed to respondent, and its officers, agents, successors, and assigns. The aforesaid order provides as follows:

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent,

May Department Stores Company, doing business as Famous-Barr Company, St. Louis, Missouri, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively witn St. Louis Joint Council, United Retail & Department Store Employees of [fol. 66] America, affiliated with the Congress of Industrial Organizations, as the exclusive representative of all its employees at its St. Louis store engaged in the busheling room, second floor, department 280, and in the busheling room, basement, department 281, including regular extra employees in these departments, but excluding the two foremen and all other employees of the respondent;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with St. Louis Joint Council, United Retail & Department Store Employees of America, affiliated with the Congress of Industrial Organizations, as the exclusive representative of all its employees at its St. Louis store engaged in the busheling room, second floor, department 280, and in the busheling room, basement, department 281, including regular extra employees in these departments, but excluding the two foremen and all other employees of the respondent, with respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Post immediately in conspicuous places at its St. Louis, Missouri, store, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a) and (b) of this Order; and (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) of this Order;

(c) Notify the Regional Director for the Fourteenth Region in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

[fol. 67] (3) On December 17, 1943, the Board's decision and order was served upon respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Messrs. Lewis, Rice, Tucker, Allen & Chubb, respondent's attorneys in St. Louis, Missouri.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, the Board is certifying and filing with this Court a transcript of the entire record in the proceedings before the Board, including the pleadings, testimony and evidence, and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the order made thereupon as set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board, and requiring respondent, and its officers, agents, successors, and assigns to comply therewith.

National Labor Relations Board, Howard Lichenstein, Assistant General Counsel.

Dated at Washington, D. C., this 10th day of March, 1944.

Duly sworn to by Howard Lichenstein. Jurat omitted in printing.

[fol. 68] Subscribed and sworn to before me this 10th day of March, 1944. John E. Lawyer, Notary Public, District of Columbia. My Commission Expires August 31, 1944. (Seal.)

[File endorsement omitted.]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 12840

NATIONAL LABOR RELATIONS BOARD, Petitioner,

vs.

MAY DEPARTMENT STORES COMPANY, Doing Business as Famous-Barr Company, Respondent

ANSWER TO PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD—Filed March 31, 1944

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Eighth Circuit:

The May Department Stores Company, a corporation, hereinafter referred to as Respondent, answers the petition filed in this Court for the enforcement of a certain order issued by the National Labor Relations Board, hereinafter referred to as the Board, against Respondent. The proceeding in which said order was issued by the Board is known upon the records of the Board as "In the matter of May Department Stores Company, doing business as Famous-Barr Company, and St. Louis Joint Council, United Retail, Wholesale and Department Store Employees of America, CIO," Cases No. 14-C-872 and R-5331.

1. In answer to the said petition of the Board filed herein, the Respondent respectfully:

(a) Admits the allegations contained in paragraph numbered 1 of said petition, except Respondent denies that [fol. 69] it has committed unfair labor practices as alleged in said paragraph of said petition.

(b) Admits that the Board on December 17, 1943, issued the order directed to the Respondent, and its officers, agents, successors and assigns, which is set forth in paragraph numbered 2 of said petition, but Respondent denies that said order was issued upon all the proceedings had in said matter before the Board and denies that said order was duly issued by the Board and Respondent states that said order is invalid for the reasons hereinafter stated.

(c) Admits the allegations of paragraph numbered 3 of the petition.

2. In further answer to the said petition of the Board Respondent states that the said order of the Board dated December 17, 1943, is invalid and should be set aside for the following reasons, to wit:

(a) The bargaining unit determined by the Board consisting of Respondent's employees engaged in the bushelling room, second floor, department 280, and in the bushelling room, basement, department 281, including regular extra employees in these departments, but excluding the two foremen and all other employees of the Respondent, is inappropriate and the action of the Board in ordering the Respondent to bargain collectively with St. Louis Joint Council, United Retail and Department Store Employees of America, affiliated with the Congress of Industrial Organizations, as the exclusive representative of the employees in said unit was arbitrary, unreasonable and capricious.

(b) Said order is not based upon any valid finding and there was no evidence that the St. Louis Joint Council, United Retail, Wholesale and Department Store Employees of America, CIO, represents any of the employees in said bargaining unit.

(c) The order of the Board that the Respondent cease and desist from in any other manner interfering with, restraining, or coercing its employees in the exercise of the right of self-organization to form, join, or assist labor organizations, to bargain collectively through representatives [fol. 70] of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act is not supported by any valid finding or by any evidence that the Respondent has in any other manner, or in any manner, so interfered with, restrained or coerced its employees in the exercise of said rights, or any of them.

3. In further answer to said petition of the Board, Respondent states that the findings and conclusions contained in the Intermediate Report of the Trial Examiner and

adopted by the Board in its decision, are erroneous in the following respects, to wit:

(a) There is no evidence in the record to support:

(1) The finding of fact, "that the respondent is engaged in commerce within the meaning of the Act."

(2) The finding of fact that, "The Joint Council represents in St. Louis various locals of United Retail, Wholesale & Department Store Employees of America which admit to membership employees of the respondent."

(3) The finding of fact that there is a "presumption arising from the certification that the Union is still the representative of the majority of the employees of the respondent in the appropriate unit."

(4) The finding of fact "that all employees of the respondent at the St. Louis store engaged in the busheling room, second floor, department 280, and in the busheling room, basement, department 281, including regular extra employees but excluding the two foremen and all other employees of the company, constitute and at all times material herein constituted a unit appropriate for the purposes of collective bargaining."

(5) The finding of fact that "on and at all times after July 12, 1943, the Union was the duly designated bargaining representative of a majority of the employees in the aforesaid appropriate unit, and that, pursuant to the provisions of Section 9 (a) of the Act, the Union was on July 12, 1943, and at all times thereafter has been, and is now the exclusive representative of all employees in the afore-[fol. 71] said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment."

(6) The finding of fact that the Respondent by refusing to bargain with the Union, "has thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act."

(7) The finding of fact that "the respondent's action in ignoring the Union while attempting to win approval of its proposals for wage increases, and in publishing the facts of its unilateral action to its employees, including employees

represented by the Union, had the effect of depriving the Union of credit which normally would accrue to it, and of nullifying its efficacy as a bargaining agent."

(8) The finding of fact that "the said action may, therefore, reasonably be said to have undermined the Union among employees for whom it had been certified as bargaining representative, and to have discouraged employees generally in their union affiliation."

(9) The finding of fact that, "Were the respondent successful in obtaining approval of its proposed wage adjustments, under the circumstances of the war emergency, this might result in the Union being foreclosed for an indefinite period from effective bargaining with reference to the wages of employees for whom it had been certified as bargaining representative."

(10) The finding of fact that, "Nor could the respondent through unilateral action place the Union in a position where it would be required to request the National War Labor Board's deletion of employees it represented from respondent's application, or assert its approval thereof, in order to maintain a semblance of authority as bargaining representative."

(11) The finding of fact that, "No justification for the respondent's unilateral actions, set forth above, is found in its contesting of the appropriateness of the unit and the Union's certification therein, since it gains no immunity for engaging in unfair labor practices until such time as ultimate adjudication of the matter has been reached in the [fol. 72] courts. 'An order of the Board is final and binding upon the parties thereto unless reversed upon appropriate judicial review.'"

(12) The finding of fact that "by its unilateral action in seeking approval of its proposed wage adjustments, and by statements of its officers and its publication *Store Chat* addressed to employees concerning said unilateral action, the respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act."

(13) The finding of fact that "The activities of the respondent as set forth in Section III above, occurring in connection with the operations of the respondent described in

Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce."

(b) The following Conclusions of Law are erroneous and contrary to the law under the facts in this case:

(1) "All employees of the respondent at its St. Louis store engaged in the busheling room, second floor, department 280, and in the busheling room, basement, department 281, including regular extra employees but excluding the two foremen and all other employees of the respondent, constitute a unit appropriate for collective bargaining, within the meaning of Section 9 (b) of the Act."

(2) "St. Louis Joint Council, United Retail & Department Store Employees of America, affiliated with the Congress of Industrial Organizations, was on July 12, 1943, and at all times thereafter has been the exclusive representative of all the employees in the aforesaid unit, for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act."

(3) "By refusing on June 19, 1943, and at all times thereafter to bargain collectively with St. Louis Joint Council, United Retail & Department Store Employees of America, affiliated with the Congress of Industrial Organizations, as the exclusive representative of all its employees [fol. 73] in the aforesaid appropriate unit, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (5) of the Act."

(4) "By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act."

(5) "The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act."

4. In further answer to said petition of the Board, Respondent states that the findings, conclusions, orders, directions and acts of the Board in the case known on the records of the Board, as, "In the matter of The May Department

Stores Company doing business as Famous-Barr Company, and St. Louis Joint Council, United Retail, Wholesale and Department Store Employees of America, CIO," Case No. R-5331, are erroneous in the following respects:

(a) There is no evidence in the record to support:

(1) The finding that the Respondent is engaged in commerce within the meaning of the Act.

(2) The finding that the Joint Council represents various locals of the United Retail, Wholesale and Department Store Employees of America in St. Louis which admit to membership employees of Respondent.

(3) The finding that cards submitted to the Regional Director and his statement in connection therewith indicated the membership of some employees of Respondent in the St. Louis Joint Council, United Retail, Wholesale and Department Store Employees of America, CIO.

(4) The finding that a question affecting commerce had arisen concerning the representation of employees of the Company within the meaning of Section 9 (c) and Section 2 (6) and (7) of the Act.

(5) The finding that the work of the employees in the busheling rooms traditionally has been regarded as a skilled trade.

[fol. 74] (6) The finding, "On November 6, 1942 the CIO filed a petition requesting a unit of the Company's selling employees."

(7) The finding that there is historically a sharp demarcation between the trades involved in the busheling rooms and in the women's alteration departments and that it does not appear that there is a substantial interchange of personnel between said departments and that traditionally such workers have been represented by separate craft unions.

(8) The finding that the employees in the busheling rooms constitute an appropriate unit.

(9) The finding that no labor organization claimed to represent the employees in a store-wide unit.

(10) The finding, "In view of the facts and circumstances outlined above we find that all employees working in the

busheling room, second floor, Department 280 and in the busheling room, basement, Department 281, including regular extra employees, but excluding the 2 foremen and all other employees of the Company, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act."

(b) The Direction of Election set forth in the Board's Decision and Direction of Election dated June 16, 1943, was erroneous and was not supported by the record and was contrary to the law under the facts shown by the record, and was inconsistent with the prior decisions of the Board, and was arbitrary, unreasonable and capricious.

(c) The Order dated June 28, 1943, denying Respondent's Motion to Reconsider the Decision and Direction of Election dated June 16, 1943, was erroneous.

(d) The Certification of Representatives issued by the board, dated July 12, 1943, was erroneous, and was not supported by the record, and was contrary to the law under the facts shown by the record, and was arbitrary, unreasonable and capricious.

5. The Board erred in entering its said order in that there is no evidence in the record to support the findings of fact [fol. 75] upon which the order was issued and there is no authority in the law to support the conclusions of law upon which the order was issued, and said order is invalid.

Wherefore, Respondent prays this Honorable Court that it make and enter herein a decree setting aside the said order of the Board in its entirety and relieving the Respondent, its officers, agents, successors and assigns, of any necessity to comply therewith, or such other relief as the Court shall deem just and proper.

The May Department Stores Company, Respondent. By Fred Z. Salomon, Vice Pres. Robert T. Burch, Milton H. Tucker, Attorneys for Respondent.

Duly sworn to by Fred Z. Salomon. Jurat omitted in printing.

(File Endorsement Omitted)

[fol. 76] In United States Circuit Court of Appeals, Eighth Circuit

No. 12,840

National Labor Relations Board, Petitioner

vs.

May Department Stores Company, Doing Business as Famous-Barr Company, Respondent

Portions of Record Printed as an Appendix to Brief of Respondent

[fol. 1] Before the National Labor Relations Board, Fourteenth Region

Case No. XIV-R-588

In the Matter of

May Department Stores Company, Doing Business as Famous-Barr Company

and

St. Louis Joint Council, United Retail, Wholesale and Department Store Employees of America, CIO

Report of Proceedings

Room 1401,
14th Floor International Bldg.,
St. Louis, Missouri,
Friday, May 7, 1943.

Pursuant to hearing the above-entitled matter came on for hearing at 10:00 a. m.

Before Howard Myers, Trial Examiner

Appearances:

Ryburn L. Hackler, for the Board.

Victor B. Harris, 1010 Pine Street, St. Louis, Mo., for the Petitioner.

Milton H. Tucker and Robert T. Burch, 208 North Broadway, St. Louis, Mo., for the Company.

Robert A. Wilson, for Joseph A. Padway, 736 Bowen Bldg., Washington, D. C., for American Federation of Labor, Intervener.

[fol. 2] FRANK VERDERBER, a witness called by and on behalf of the Petitioner, being first duly sworn, was examined and testified as follows:

Direct examination.

Trial Examiner Myers: What is your name?
A. Frank Verderber.
Trial Examiner Myers: Where do you live?
A. 5511 Alaska.
Trial Examiner Myers: St. Louis, Missouri?
A. That's right.
Trial Examiner Myers: You may be seated. You may proceed, Mr. Harris.

By Mr. Harris:

Q. You are employed by Famous & Barr, the May Company?
A. Yes, sir.
Q. In St. Louis?
A. Yes, sir.
Q. How long have you been so employed?
A. Starting in 1924, making nineteen years.
Q. What is your occupation?
A. Presser.
Q. In what department?
A. No. 280 Department.
Q. Department 280?
A. That is right.
Q. What kind of work have you done in that department?
A. Pressing men's clothes and boy's clothes.

Trial Examiner Myers: Have you done that for the past nineteen years?
A. Yes, sir.

By Mr. Harris:

Q. That is what you have been doing for the past nineteen years?

A. Yes, sir.

Q. What other work is done in that department besides pressing work you have described?

A. Alteration of clothes, I press.

Q. Clothes in what department are altered?

A. The number of the department?

Q. The number and name.

A. Men's Clothing No. 4, Boy's Clothing, No. 5, Trousers Department No. 38, and Sportswear, No. 47.

Q. Are all the alterations from clothing in those departments, that is, men's clothes, boy's clothes, sportswear and trousers, done in Department 280 where you work?

A. Yes, sir.

[fol. 3] Trial Examiner Myers: Men's and boy's trousers?

A. Yes, sir.

Trial Examiner Myers: What about ladies' slacks?

A. We don't have any.

By Mr. Harris:

Q. Following up the Examiner's question, are the ladies' clothes—Famous & Barr also sell ladies' clothes as well as men's, do they not?

A. That is right.

Q. Where are ladies' clothes altered and pressed?

A. As far as I know on the 11th floor in the ladies' alteration room.

Q. Where is Department 280 located?

A. Second floor balcony, Locust Street side.

Q. Describe the physical setup of that department, how you get into it, whether it is separated from the rest of the store, and so on.

A. You enter from the 2nd floor about the middle of the Locust Street side by the Will Call Department up to a short flight of stairs.

Q. You mean that you go up a short flight of stairs to get into your department?

A. Two short flights.

Q. Go ahead.

A. It extends from 6th Street approximately three-quarters of the way down Locust to 7th Street, approximately, I don't know exactly how far, and there is an opening, the shop is divided into two parts, one being a new addition that was made last spring. In the east half there

has been a new addition and in between the two there is an opening approximately, I don't know, twelve, maybe twelve to fifteen feet, you can see down into the floor from the balcony, the 2nd floor balcony.

Q. You are up on the balcony, through this opening you can see the second floor?

A. That is right.

Q. That is between the two parts?

A. Between the two parts of the shop.

Q. In the two parts of the shop, can you see down into the 2nd floor?

A. That is right.

Q. You can or cannot see down when you are not at this opening?

A. That is right, you cannot see down.

Q. That is completely separated from the rest of the store?

A. Yes, sir.

[fol. 4] Trial Examiner Myers: What is in those two parts?

A. The west half is the coat shop and the east half is the pants shop, at the present time. Formerly it was all down in the west half, in the old shop, but since they have added the new addition they have put the pants over in the new addition.

By Mr. Harris:

Q. You mean in the old part of the west half that is the part where coats are altered and pressed?

A. That is right.

Q. And in the east half, or the new part, that is where pants are altered and pressed?

A. That is right.

Q. Do you have a locker room there?

A. There is a locker room at the end of the west half of the shop, but it is closed off, it is locked. Various employees use it on the 2nd floor, I don't know who, we don't use it from the shop.

Q. You do not use it?

A. No, sir.

Q. Do you have a separate locker room?

A. Immediately down underneath that we have ours.

Q. What do you mean underneath it, on the 2nd floor?

A. Yes, sir.

Q. That is where your locker rooms are?

A. Yes, sir.

Q. Do the elevators stop on the balcony where you are located?

A. They do not.

Q. Is there any place for them to stop?

A. There is not.

Q. So the only way you can get up there is by the stairway you have described?

A. That is right.

Q. What time do you report for work, or, rather, what time do the employees in Department 280 report for work?

A. We start work at 8:30, of course we are usually there a little earlier, maybe ten or fifteen minutes sooner, but we start to work at 8:30.

Q. What time do you get off?

A. 5:00 o'clock.

Q. How much time do you have for lunch?

A. One hour.

Q. How many days a week do you work?

A. Six days.

Q. What time do the other employees in the store report for work?

A. 9:00 o'clock.

Q. What time do they get off?

A. 5:00 o'clock.

Q. How much time do they have for lunch?

[fol. 5] A. I believe they all get forty-five minutes, I am not positive of that.

Trial Examiner Myers: When you say all the other employees, whom do you mean, the clerical or the sales or selling employees?

Mr. Harris: I meant all of them, if he knows.

The Witness: I don't know how the carpenters and electricians work, and all that. The majority of the people in the store I think work from 9:00 to 5:00.

Trial Examiner Myers: Are you referring to the sales people?

A. I am referring to the sales people, wrappers, cashiers.

By Mr. Harris:

Q. And stock clerks?

A. Stock clerks.

Trial Examiner Myers: What about the people in the executive offices?

A. I don't know about their hours.

By Mr. Harris:

Q. The sales people in the store, clerks and wrappers and cashiers, and so on, work from 9:00 to 5:00?

A. As far as I know, yes.

Q. And they have forty-five minutes for lunch?

A. That is right.

Q. Is there any other place in the store where men's clothing is altered and pressed?

A. There is another department in the basement, No. 281.

Q. What do they do down there?

A. They alter the clothes for men and boys, the two departments, men's clothing and boy's clothing.

Q. This Department 281, located in the basement, do I understand you to mean that they alter men's and boy's clothing sold in the basement?

A. That is right.

Q. That is all they do down there?

A. That is all they do.

Q. All the other clothing sold in the store is altered in Department 280, where you work, all of the men's and boy's clothing?

A. That is right.

Q. What generally is your department referred to, what is the common name for it?

[fol. 6] A. Well, it is called the Busheling Room, Alteration Room, Tailor Shop.

. . . . . .

Q. When did you join the United Retail, Wholesale Department Store Employees of America?

A. September, 1941, I beg pardon, in 1942.

Q. Did the rest of the department join about that same time?

A. The rest of our department?

Q. Yes.

A. Yes, sir.

Trial Examiner Myers:

Q. When did you join, did you say?
A. September, 1942.

By Mr. Harris:

Q. Did you all join together?
A. Not at one time, no.
Q. At the time you joined, did you make any request, did your department make any request that you should be considered as a separate unit and be entitled to bargain for yourselves?
A. We did when we felt we were strong enough, that we were one hundred per cent.
Q. I am not sure that I understand your answer.

Trial Examiner Myers: Read the answer.

(Answer read by the Reporter.)

Trial Examiner Myers: What do you mean one hundred per cent?
A. We had every employee in our department organized or signed up.
Trial Examiner Myers: As members?
A. As members of the union.

By Mr. Harris:

Q. You felt you should be a separate unit for bargaining?
A. That is right.
Q. Why is it,—did you feel that same way in September, 1942?
A. Yes, sir.
Q. Why is it you waited until this time to file your petition?
A. Because we wanted to petition with the whole store.
Q. By that you mean——
A. Every employee in the store.
Q. You thought you could help the other employees?
A. That is right.
[fol. 7] Q. You always considered yourself a separate unit?
A. Yes, sir.

By Mr. Harris:

Q. Is it customary that people be transferred from your department, Department 280, to other departments in the store, and vice versa?

A. Our employees have never been transferred to other departments except last year.

Q. That is the first time since 1924 when you have been there?

A. Yes, sir.

Q. That there have been any transfers at all?

A. That is right.

Q. Tell about the transfers, last year, when were they?

A. Around September they transferred some people out of our shop into the various other departments.

Q. How many people were transferred?

A. I think somewhere around eleven people.

Q. Were there any people transferred into your department?

A. There were more of them asked to take these other jobs in other departments but some refused and I think eleven accepted.

Q. Those who refused to be transferred, what happened to them?

A. They quit.

Q. They quit rather than be transferred?

A. That is right, because they were reduced to a lower rate, much lower than they happened to get in our department.

Q. A lower rate of pay?

A. Yes, sir.

Q. Were there any people transferred from other departments in the store to replace these people who quit or were transferred?

A. There were not until three or four weeks later, they rehired two and then later on another one, altogether four of them have been replaced of those that have been transferred and came back in our shop.

Q. You mean four?

A. One just recently.

Trial Examiner Myers: Now, wait——

By Mr. Harris:

Q. Four were transferred and came back?

A. Four of those eleven came back.

[fol. 8] Q. Those who quit, were they rehired?

A. No, sir.

Trial Examiner Myers: Were there any replacements?

A. No, sir.

Trial Examiner Myers: In two weeks two were transferred back to your department?

A. That is right.

Trial Examiner Myers: And later two more were retransferred back to your department, is that right?

A. Four altogether.

Trial Examiner Myers: You would say within three or four weeks?

A. That is right.

Trial Examiner Myers: Two were retransferred?

A. That is right.

Trial Examiner Myers: And, sometime later two more?

A. One and one here this month, this last month.

By Mr. Harris:

Q. Has your department ever done any work in women's clothes?

A. Never with the exception of one time.

Q. When was that?

A. I have the exact time, March 19.

Q. Of this year?

A. That is right.

Q. What did that work consist of?

A. There were thirty ladies' coats, spring coats.

Q. What was done?

A. I had to press them.

Q. Were they altered in your department?

A. No, sir.

Q. The only thing that was done was press them?

A. Yes, sir.

Q. Is that the only time you have worked on women's clothes in the nineteen years you have been employed at Famous-Barr?

A. That is right.

Trial Examiner Myers: Did anybody else in your department work on women's clothes in the last nineteen years?

A. No, sir.

Q. Trial Examiner Myers: This year; were there seven persons transferred in September, 1942? In what department was that?

A. I believe two in the marking room.

[fol. 9] Trial Examiner Myers: The Marking Room?

A. Yes, sir.

Trial Examiner Myers: Marking what?

A. Marking price tags for clothing.

Trial Examiner Myers: For clothing?

A. And other articles, I don't know exactly, I have not been in the department.

Trial Examiner Myers: Is that in the Main Store?

A. I believe it is in the St. Charles Warehouse.

Trial Examiner Myers: What about the other nine, do you know?

A. One in the Fur Department.

Trial Examiner Myers: Women's furs?

A. Yes sir, one in the Corset Department, I don't recollect the others.

Trial Examiner Myers: In the Fur Department——

A. One in the Basement Tailor Shop, Basement Busheling Room rather. If you don't mind I will refer to my notes and I will do better. One in the Warehouse on Spring Avenue.

Trial Examiner Myers: Do you know what he did up there?

A. I believe he was put on as a packer, those are the only ones I remember.

Trial Examiner Myers:

Q. The personnel transferred to the Fur Department, what did he do there, sell?

A. That was a woman, no, she repaired furs, or altered furs, whatever work they do up there, I don't know.

Trial Examiner Myers: What about the Corset Department, was that a woman?

A. Yes, sir.

Trial Examiner Myers: What was her job there?

A. I don't know.

Trial Examiner Myers: You mean a sales person?

A. I don't know what she did up there.

[fol. 10] Trial Examiner Myers: The Basement Tailor Shop?

A. That is the basement, that was also a woman. She altered clothing.

Trial Examiner Myers: Were eleven women transferred, or were they divided?

A. One man to the warehouse, transferred to the Spring Avenue Warehouse, that was a man. One was transferred to the Boy's Clothing as a salesman.

* * * * * * * *

Cross-examination.

By Mr. Wilson:

Q. How do you pronounce your name?

A. Verderber.

Q. Mr. Verderber, do you belong to a labor organization?

A. Where?

Q. Do you belong to a labor union?

A. Yes, sir.

Q. What union do you belong to?

A. United Retail, Wholesale, CIO.

Q. Is there any Local number?

A. Local 372.

Q. Local 372 of that organization?

A. Yes, sir.

Q. When did you join the union?

A. Last September.

Q. What is the jurisdiction of that organization insofar as Famous-Barr Department Store is concerned? If that is not clear, who among the Famous-Barr Department Store is eligible for membership in your organization?

A. All employees are eligible.

Q. Do you know whether Local 372 has any employees who are members outside of the busheling department?

A. Yes, sir.

Q. Do they have any outside of that?

A. We have the majority.

Q. You have the majority?
A. We did have.
Q. When did you have the majority?
A. When we filed the petition for the whole store.
Q. When was that?
A. I don't remember the exact date.
Q. Do you claim any members now?
A. Yes, sir.
Q. Very many?
A. I don't know exactly how many.
Q. Would you say you had a substantial number?
A. Yes, sir.

[fol. 11] Trial Examiner Myers: Are you an officer of Local 372?
A. No, sir.

By Mr. Wilson:

Q. Are you a member of any committee of 372?
A. Yes, sir.
Q. What committee is that?
A. The Master Committee.
Q. What is the Master Committee?
A. It is composed of one member from various departments that have a substantial membership in the union.
Q. As a member of the Master Committee, did you have any knowledge of the membership of the union throughout the store?

Mr. Harris: Are you trying to show that Local 372 has members in other departments?
Mr. Wilson: We are trying to show that Local 372 has a substantial membership throughout the store.
Mr. Harris: I will concede that we have a substantial membership throughout the store.
Trial Examiner Myers: Is that concession all right, Mr. Wilson?
Mr. Wilson: That concession is all right. I will hand you this paper and ask you to tell me what that is.
Mr. Harris: Suppose we have it marked if you are going to introduce it.
Mr. Wilson: I don't know if I will introduce it or not.
Mr. Harris: May I see it?

By Mr. Wilson:

Q. Do you know what that is?

A. One of our leaflets we gave to the employees from the union.

Q. A leaflet of what?

A. Of the CIO.

Q. Of Local 372?

A. Of Local 372.

Q. I wonder if you can read from that leaflet, after it is marked, I want it to be read into the record.

Trial Examiner Myers: These people might object to that going into evidence.

Mr. Wilson: I have not heard any objection.

[fol. 42] Mr. Harris: I have not had a chance to look at this yet. Mr. Examiner, if the purpose is to prove that our people distributed the leaflets I will admit we did. I don't know the reason to take up time to read it, if you want to read it I will have no objection.

By Mr. Wilson:

Q. Mr. Verderber, you stated that on one occasion the bushoeing department bargained with the employees?

A. Yes, sir.

Q. What department was that, what is the number?

A. Our department, 280.

Q. Did you bargain on behalf of the employees in Department 281 at the same time?

A. No, sir.

Q. Who did the bargaining with the employers?

A. Must I mention the names?

Q. Well, I would like the names, and the manner in which it was done.

Trial Examiner Myers: Do you mean who was the spokesman?

Mr. Wilson: I want to know who went in to see the immediate superiors.

A. We did not go in to the superiors, we took it to our foreman first.

Q. When did you do it? Did a committee from your department go before him?

A. No, immediately after work, after 5:00 o'clock, we

were gathered around the foreman's table and one of our employees made a statement that we wanted an increase to the foreman.

Q. One said you wanted an increase?

A. Yes, sir.

Q. What did he say to you?

A. You mean the foreman?

Q. Yes.

A. He said he would take it up with Mr. Koven.

Q. Did that end the meeting?

A. Yes, that was all there was to it.

Q. What was the next development?

A. We waited until we were called down into the office, into Mr. Koven's office and notified of our increase.

Trial Examiner Myers: You said Mr. Koven is a buyer, a buyer of men's clothing?

[fol. 13] By Mr. Wilson:

Q. He called you down in the office individually and told you you were getting an increase?

A. That is right.

Trial Examiner Myers: Is he the buyer for the Boys' Clothing, too?

A. No, that is a separate buyer.

By Mr. Wilson:

Q. Do you know if the employees in Department 281 also received an increase?

A. I don't know.

Trial Examiner Myers: Is Mr. Koven also a buyer of the Men's Clothing in the basement?

A. No, sir.

Trial Examiner Myers: That is another buyer?

A. Yes, sir.

By Mr. Wilson:

Q. You stated you made a request to be recognized as bargaining unit, that is, Department 280 made a request to be recognized as a bargaining unit?

A. When do you mean?

Q. I asked if you so testified on direct examination.

Mr. Harris: What was the question?

Mr. Wilson: I asked if he testified on direct examination if the employes in Department 280 asked to be recognized as a bargaining unit.

The Witness: That is right.

By Mr. Wilson:

Q. When did you make that request?

Mr. Harris: I don't think the question is very clear.

Mr. Wilson: I am asking for a date.

Mr. Harris: Asked whom? Asked one of the employees, who do you mean?

Mr. Wilson: I will clear it up.

By Mr. Wilson:

Q. You made the request, you say, to whom did you make the request?

A. To our Local.

Q. You made it to the Local?

A. That is right.

Q. Did you ever make such a request to the employer?

A. No, we did not.

Q. After the request what was decided?

A. It was decided to go through with it.

[fol. 14] Q. To go through with it as a separate unit?

A. That is right.

Q. When was that?

A. I haven't the exact date,—wait, maybe I have.

Q. First, let me ask you, when was the request made in your Local Union?

A. I cannot tell that, I don't know the date.

Q. Do you know approximately the date, the month?

A. Well, we were ready to bargain immediately when we were 100%, we were immediately ready to bargain then.

Q. That is not an answer. Strike that, if you will.

Trial Examiner Myers: Motion denied. Mr. Witness, Mr. Wilson wants to know when you requested the Union to recognize you to bargain for Department 280 as a separate unit.

A. When we saw we were 100%, but we waited then, we thought we would get the whole house but later on we did not want to wait any more and then petitioned for ourselves.

Q. When did you ask the Local—you said you asked the Local to bargain for you as a separate unit?

A. If you will let me look it up I will look it up. I have it down here somewhere.

Q. Approximately when?

A. I don't seem to have it.

Q. Well, was it this year?

A. Yes, it was this year, I don't know the exact date.

By Mr. Wilson:

Q. Was it in April of this year?

A. I think it was. I have got it down here somewhere.

Q. See if you can find it.

Mr. Harris: Maybe I can facilitate this a little.

By Mr. Harris:

Q. Are you familiar with the letter Mr. Gibbons wrote to the Company?

A. That is right.

Q. Was your request made prior to the time that letter was written?

A. That is right.

By Mr. Wilson:

Q. Do you know approximately how many days prior?

A. I do not seem to have it.

Q. It was sometime prior to the letter Mr. Gibbons wrote?

A. Yes, sir.

Q. About how long prior to that letter?

[fol. 15] A. I could not say. That was depending upon the time of the Master Committee meeting, and the letter was written by Mr. Gibbons and sent.

Q. The Master Committee decided the policy of the organization?

A. That is right.

Trial Examiner Myers: The letter asks that Nos. 280 and 281 be kept separate units?

A. Yes, sir.

Trial Examiner Myers: What about No. 280? When did you ask that be a saparate unit?

A. We asked both at the same time.

Trial Examiner Myers: You asked the Company, is that right?

A. We did not ask the Company anything.

Trial Examiner Myers: That letter——

A. Until the letter was written.

By Mr. Wilson:

Q. That was Local 372 which wrote to the Company?

A. That is right.

Q. It was not a group of people in Department 280 and 281 that wrote to the Company?

A. They represent them.

Q. That was representatives of the employees of this Company?

A. That is right.

Q. And the request was made sometime between January 1, 1942, and March 11, 1943, of this year. Would you say it was probably in March, 1943, eleven days before this—and I am handing you Board's Exhibit No. 5—was sent?

A. That is it.

Q. About how many days before would you make that?

A. I could not say that. I don't know. I told you before I don't know.

Q. A week or two weeks? That does not refresh your memory any?

A. No, it doesn't. I don't want to lie about it.

Q. You state you are a member of the Master Committee? You are a member of that committee?

A. I am.

Q. Can you identify this paper?

A. Yes, sir.

Q. Tell me what it is.

Mr. Harris: May I see it, Mr. Wilson?

Mr. Wilson: Yes, sir.

The Witness: It is a paper we put out immediately——

Mr. Harris: Why don't you have this marked?

[fol. 16] Mr. Wilson: All right, mark it for identification as Intervener's Exhibit No. 2.

(Thereupon the document above referred to was marked as Intervener's Exhibit No. 2 for identification.)

By Mr. Wilson:

Q. That is the paper given out by Local No. 372?
A. That is right.

Mr. Wilson: I would like to offer that as an exhibit.
Trial Examiner Myers: Any objection?
Mr. Harris: No objection.
Mr. Tucker: No.
Trial Examiner Myers: There being no objection, I will ask the Reporter to please mark the paper in evidence as Intervener's Exhibit No. 2.

(The document heretofore marked Intervener's Exhibit No. 2 for identification was received in evidence.)

Trial Examiner Myers: What is the purpose of this, Mr. Wilson?
Mr. Wilson: That is for the purpose of that statement there (indicating).
Trial Examiner Myers: You mean that part marked in pencil?
Mr. Wilson: It is marked, yes, sir.
Trial Examiner Myers: This paper was issued on December 26, 1942.
The Witness: Yes, sir.
Trial Examiner Myers: And was distributed to the members of the Company?

A. Yes, sir.
Trial Examiner Myers: And your picture is on it?
A. Yes, sir.

By Mr. Wilson:

Q. Do workers in Department No. 280 consider themselves as second floor employees?
A. That is right.

Mr. Wilson: I would like to hand you this paper marked as Intervener's Exhibit No. 3 for identification.

[fol. 17] (Thereupon the document above referred to was marked as Intervener's Exhibit No. 3 for identification.)

By Mr. Wilson:

Q. And ask you if you can identify that.
A. It is another one of our leaflets.

Q. What is the date on it?
A. December 28, 1942.

Mr. Wilson: I will offer it.
Trial Examiner Myers: When was it distributed?
A. That same day.
Trial Examiner Myers: To the employees of the Company?
A. Yes, sir.
Trial Examiner Myers: I mean to the employees of Famous-Barr?
A. Yes, sir, to the employees, that is right.
Trial Examiner Myers: Any objection to this paper going in evidence?
Mr. Tucker: So far as the Company is concerned there is no objection to it going into evidence so far as to show that the statements in the circular were made, but we do not want to be construed as admitting the truth of the statements contained in the circular.
Trial Examiner Myers: Very well. That applies to the other two that went into evidence?
Mr. Tucker: Yes, sir.
Trial Examiner Myers: What about the one copied into evidence in the record?
Mr. Tucker: The same thing applies. The statements were made in the circulars, but we do not want to be foreclosed on the question of proof of the truth or falsity of those things.
Trial Examiner Myers: Very well. Mr. Harris, have you any objection to the paper going into evidence?
Mr. Harris: No, sir.
Trial Examiner Myers: There being no objection, I will ask the Reporter to mark the paper in evidence as Intervener's Exhibit No. 3.

[fol. 18] (The document heretofore marked Intervener's Exhibit No. 3 for identification was received in evidence.)

Trial Examiner Myers: What do you want to call the Board's attention to?
Mr. Wilson: I want to call the Board's attention specifically to that part of the exhibit which is outlined in red, that there would be a meeting of all second floor employees at 5:50 o'clock the night of September 28, 1942, and the address is on there.

Trial Examiner Myers: Don't drop your voice. Is that you want?

Mr. Wilson: The Board might take notice of the portion I have marked on the second page, which gives some information as to the formation of this Master Committee to which we have referred previously.

Trial Examiner Myers: And that is marked in blue ink, is that right?

Mr. Wilson: That is marked in blue and I think the red is in pencil, a little of it.

Trial Examiner Myers: All right.

Mr. Wilson: Since the Company objects to the whole thing, I would just like to have copied into the record certain portions of this paper which I will ask to be marked as Intervener's Exhibit No. 4 for identification.

(Thereupon the document above referred to was marked as Intervener's Exhibit No. 4 for identification.)

Mr. Wilson: I want only those portions marked to be the exhibit and the rest excluded. Is that possible?

Trial Examiner Myers: What portions do you want copied into the record, and why should not the paper go into evidence instead of the copied part of it?

Mr. Wilson: I have no objection to the paper going into the record as evidence. The Company seems to have. The part I consider material is just the part I have outlined there for this hearing. The rest I consider pretty much immaterial in this hearing.

[fol. 19] Mr. Tucker: So far as the Company is concerned, if the same understanding is had, that we do not admit the truth of the other statements or any of the statements, and these "Famous Sayings" are offered simply for the purpose of saying the statements were made by Local 372, then I have no more objection to this particular exhibit going in than I have to the others.

Trial Examiner Myers: What about you, Mr. Harris?

Mr. Harris: I have no objection to it going in. In fact, I insist the whole thing be admitted. I think that is the only proper way to do it.

Mr. Wilson: Perhaps under such an understanding instead of copying from the first exhibit we can admit the whole thing if the Company is agreeable to it. There is no objection.

Trial Examiner Myers: You mean Intervener's Exhibit No. 1 for identification?

Mr. Wilson: I mean Intervener's Exhibit No. 1.

Mr. Tucker: I have no more objection to the first than to the others. Just as well let the first one in, and the same conditions apply, as evidence of the fact the statements were made by this Union.

Trial Examiner Myers: That is your position?

Mr. Harris: Yes. My position is not quite the same——

Trial Examiner Myers: You mean you want the whole paper in if anything goes in?

Mr. Harris: That is right.

Mr. Tucker: I think we might put in the record, as I understand, Mr. Examiner, the part he particularly wants, the Board to take cognizance of that on each of these exhibits, the part outlined in pencil or pen.

Trial Examiner Myers: That is what I am going to ask him. First, take Intervener's Exhibit No. 1 for identification. Will you please state on the record, Mr. Wilson, just what you want to call the Board's attention to?

Mr. Wilson: On Intervener's Exhibit No. 1, what I want [fol. 20] the Board to take particular notice of is the part which I have marked out and encircled with red pencil. Perhaps we might save time. I have quite a few of these leaflets, each of which I have marked.

Trial Examiner Myers: Let's pass on these first two offers. There being no objection, I will ask the Reporter to please mark in evidence these papers as Intervener's Exhibits Nos. 1 and 4 respectively.

(Thereupon the documents heretofore marked Intervener's Exhibits Nos. 1 and 4 for identification were received in evidence.)

* * * * * * *

By Mr. Wilson:

Q. In order to shorten proceedings, I am going to hand you papers which have been marked for identification as Intervener's Exhibits Nos. 5 through and including 16, and ask if you can identify those as circulars.

(Thereupon the documents above referred to were marked as Intervener's Exhibits Nos. 5 to 16 inclusive for identification.)

Mr. Harris: In order to shorten things further, I thought we had agreed it would be admitted that all of Intervener's Exhibits Nos. 5 through 16, all of which are marked, are circulars issued by our Union. I will so stipulate.

Trial Examiner Myers: And that they were distributed on the dates they bear?

Mr. Harris: They were distributed on or about the dates they indicate.

Trial Examiner Myers: I do not want "on or about." Were they distributed on the dates those circulars bear?

Mr. Harris: That is the closest I can come to it, on or about, for in some instances it might be a day later or two days later, depending upon weather conditions.

Trial Examiner Myers: And they were distributed to employees of the Company?

Mr. Harris: That is right.

[fol. 21] Mr. Wilson: Within a day or two of the date they bear?

Mr. Harris: Yes, sir.

Trial Examiner Myers: Any objection, gentlemen, to those papers going in evidence?

Mr. Tucker: No objection, with the understanding they are not taken as any proof of the facts stated, but simply that the statements were made in the circulars.

Trial Examiner Myers: Have you any objection, Mr. Harris?

Mr. Harris: No, I have no objection to their admission.

Trial Examiner Myers: There being no objection, except as stated by Mr. Tucker, I will ask the Reporter to please mark those papers in evidence as Intervener's Exhibits Nos. 5 to 16 inclusive.

(The documents heretofore marked Intervener's Exhibits Nos. 5 to 16 inclusive for identification were received in evidence.)

By Mr. Wilson:

Q. You testified, Mr. Witness, some time ago, or rather this morning, about the Master Committee.

A. That is right.

Q. You said it was a committee formed by representatives of the various departments in the Famous-Barr store.

A. That is right.

Q. Its purpose is to formulate the policy for the store?

A. That is right.

Q. Can you tell me the date upon which that committee was formed?

A. I do not know that, because I came into the Master Committee after it was already formed.

Q. When were you elected or selected upon the committee?

A. I came in in September.

Q. September what?

A. The exact day I do not recollect, but the month of September.

Trial Examiner Myers: What year?

A. Last year, 1942.

[fol. 22] By Mr. Wilson:

Q. And the committee was formed prior to September, 1942?

A. Yes, sir.

Q. Has CIO retail clerks abandoned their attempt to organize the Famous-Barr Store or their employees?

A. No, they have not.

Q. They are still actively organizing all of them?

A. Yes, sir.

Q. Does Local 372 take into membership employees of any department store other than Famous-Barr?

Mr. Harris: If you know.

Mr. Wilson: If you know.

A. Well, I don't know.

By Mr. Wilson:

Q. You do not know?

A. No.

Q. Did you sign an authorization card?

A. I did.

Q. Which union did you ask to represent you?

A. The United Wholesale, Retail CIO Local 372.

Q. Have you ever signed a card asking the St. Louis Joint Council to recognize you as a bargaining agent?

A. No.

Mr. Tucker: Recognize? You mean represent?

Mr. Wilson: Represent instead of recognize. Change my question to use the word "represent."

Trial Examiner Myers: You never designated the St. Louis Council to represent you?

A. No, sir.

By Mr. Wilson:

Q. Do you know of any of the employees in Department 280 or 281 that have designated the Joint Council to represent them as a bargaining agent?

A. Every one of them.

Trial Examiner Myers: You did not listen to the question.

Mr. Harris: I do not think he understood the original question. You might ask him what the St. Louis Joint Council is, if you want direct testimony.

Mr. Wilson: No, you can ask that; I will ask my questions.

By Mr. Wilson:

Q. You stated you had never signed a card authorizing the St. Louis Local Joint Council to represent you in collective bargaining?

[fol. 23] Mr. Harris: I think the question is misleading, and that is how he misunderstood it.

Trial Examiner Myers: He is going back and asking now whether he ever designated the Council.

Mr. Harris: His question now is did he ever sign a card. He may have done in some other way.

Mr. Wilson: I will let it stand as it is, whether he ever signed a card.

Trial Examiner Myers: Did you ever sign a card?

A. I did, yes, to designate Local 372.

By Mr. Wilson:

Q. Have you ever signed a card designating the St. Louis Joint Council?

A. I signed no card to that effect, no.

Q. Have you ever authorized the St. Louis Local Joint Council to represent you?

A. I think that takes care of it automatically. When I signed that first card.

Q. When was the Local Joint Council first formed?

A. I don't know that.

Q. Do you know of any employees that signed a card designating the Local Joint Council to represent such employees as that employee's bargaining representative?

A. I don't know of any.

Mr. Tucker: I might suggest you use the word "Local" in connection with the St. Louis Joint Council and that might be misleading.

Mr. Wilson: I thought that was the name of it.

Mr. Tucker: It just says "St. Louis Joint Council."

Mr. Wilson: Correct that. Where I have said "Local Joint Council" I mean "St. Louis Joint Council."

By Mr. Wilson:

Q. Do you know anything about the organizing activities of the retail clerks in any stores other than the Famous-Barr?

A. I do not.

Q. Can you identify this document, Mr. Harris?

Mr. Harris: I guess that is what it appears to be. If you assure me it is a photostat of it, I will take your word for it.

[fol. 24] Mr. Wilson: It is a photostat of it. I will ask it be marked for identification as Intervener's Exhibit No. 17.

(Thereupon the document above referred to was marked as Intervener's Exhibit No. 17 for identification.)

Mr. Wilson: He has admitted this is a copy of their petition. I wonder if you want to identify it further by the witness, or if it may be admitted by statement of counsel?

Trial Examiner Myers: You mean the petition filed in the "R" case?

Mr. Wilson: Yes.

Trial Examiner Myers: If counsel will stipulate it is, that is all that is necessary. Do you so stipulate?

Mr. Harris: I said I would stipulate if Mr. Wilson said that is a photostat of the petition filed in the previous case I will accept his word for it.

Mr. Wilson: I will say that is the photostat of the petition in the former case.

Trial Examiner Myers: And do you so stipulate, Mr. Tucker?

Mr. Tucker: Yes.

Trial Examiner Myers: And now you offer it in evidence?

Mr. Wilson: Yes, sir.

Trial Examiner Myers: Is there any objection? There being no objection, I will ask the Reporter to please mark this paper in evidence as Intervener's Exhibit No. 17.

(The document heretofore marked Intervener's Exhibit No. 17 for identification was received in evidence).

By Mr. Wilson:

Q. I will hand you Intervener's Exhibit No. 17, and ask you if you can state whether bushelmen were included in the unit described and alleged to be appropriate by the Petitioning Union.

Mr. Harris: I object to that. It does not—the document in itself is the best evidence. Whatever it has in it will [fol. 25] speak for itself. If you are asking for an interpretation on it, I think the Board has already interpreted it.

Trial Examiner Myers: I will sustain the objection.

Mr. Wilson: On the same basis, you have no objection to the decision in the former case?

Mr. Harris: No, that is all right. I will consent to such a document.

Mr. Wilson: I would like to have this marked as Intervener's Exhibit No. 18 for identification.

(Thereupon the document above referred to was marked as Intervener's Exhibit No. 18 for identification.)

Mr. Wilson: Upon stipulation of counsel for the Petitioning Union and the Company, I will offer that as an exhibit. I offer it because I am not submitting it as precedent in any case but for the findings made by the Board on the unit contended for by the Petitioning Union in former proceedings.

Trial Examiner Myers: This is the Board's decision in Case R-4580, is that correct?

Mr. Wilson: Correct.

Trial Examiner Myers: Any objection, gentlemen?

Mr. Tucker: No objection.

Mr. Harris: No, sir.

Trial Examiner Myers: There being no objection, I will ask the Reporter to please mark that paper in evidence as Intervener's Exhibit No. 18.

(The document heretofore marked Intervener's Exhibit No. 18 for identification was received in evidence.)

By Mr. Wilson:

Q. Is Local No. 372 affiliated with or part of the St. Louis Joint Council?

A. It is.

Q. Do you know of what the St. Louis Joint Council is composed of, what organizations?

A. It is composed of the various Locals in the city.

Q. Could you name them or some of them?

A. No, I could not.

[fol. 26] Q. Do you know if there are more Locals than Local 372?

A. Yes.

* * * * * * *

Mr. Tucker: As a result of a discussion with counsel for the Petitioning Union, it may be stipulated that Departments 280 and 281, which are claimed to be the appropriate unit in this proceeding, are specifically included in Board's Exhibit No. 11 in the former Representation case as being within the appropriate store-wide unit in that proceeding. That exhibit was prepared at the conclusion of three days of testimony when the matter of the appropriate unit had been thoroughly thrashed out, and after some changes had been made in the unit. It was specifically included with a large number of other departments by those specific department numbers. That is correct, is it?

Mr. Harris: That is substantially correct. I do not know that I want to agree with all your interpretation or semi-interpretation, but I will admit Departments 280 and 281 were included in the unit sought by the Petitioner in the preceding Representation case.

Mr. Tucker: It goes further than that. It also goes to the extent there were frequent discussions during the course of the three days as to what specific departments were included and excluded, and at the end of the hearing Exhibit No. 11 was prepared by the Petitioning Union which brought up to date all the changes in the proposed unit. In that final exhibit Departments Nos. 280 and 281 appear among the included departments in the proposed unit. That is correct, isn't it?

Mr. Harris: So far as I know. I do not recall now just when that exhibit was prepared. There isn't any question

about it, and I do not wish to question the fact that Departments Nos. 280 and 281 were included in the unit sought at that time.

Mr. Wilson: After due deliberation and consideration.

Mr. Tucker: That is the point I want to make, that there were changes made between the unit as originally proposed in the petition and the unit as finally submitted to the Board for its consideration. In the final submission of the pro- [fol. 27] posed unit to the Board by this Exhibit No. 11 I referred to, Departments 280 and 281 were specifically included.

Trial Examiner Myers: As I get from what you say, Mr. Tucker, at the beginning of the hearing the Petitioner in that previous Representation case sought a certain unit, and that thereafter that unit was changed?

Mr. Tucker: That is right.

Trial Examiner Myers: Isn't that shown by the petition filed by the Petitioner in that case and by Exhibit No. 11?

Mr. Tucker: It is shown. I thought it would simplify the work of anyone who had to read this record to make this thing specific, because in the original claimed unit in the previous Representation case the departments are not listed by number. They were by more general classifications. After that matter was discussed, at the conclusion of the hearing this Exhibit No. 11 was prepared and went into detail and listed the inclusions and exclusions by specific department numbers. I want the record to be clear that Departments Nos. 280 and 281 were among the inclusions of the previous unit at that stage of the proceedings in the previous case. Is that correct, Mr. Harris?

Mr. Harris: There is no question that Departments Nos. 280 and 281 were included in the unit sought at that time.

Mr. Tucker: At the conclusion of the hearing?

Mr. Harris: At the conclusion of the hearing, and so far as I know all the way through.

* * * * * * *

By Mr. Tucker:

Q. How did it happen that the St. Louis Joint Council filed this petition for representation of the bushelmen departments?

A. How did it happen?

Q. Yes.

A. I could not answer that very well.

Q. Do you know?

A. I don't.

Q. Do women work in your busheling departments, in No. 280?

A. Yes, sir.

[fol. 28] Q. Do you participate in the meetings that the Master Committee has?

A. I do.

Q. Do you go to them regularly?

A. Yes, sir.

Q. Have you been doing that since last September, 1942?

A. I may have missed a few.

Q. But for the most part you attended the meetings regularly?

A. That is right.

Q. How often do they have these meetings?

A. Once a week.

Q. And you may have missed a few but generally you have attended, is that right?

A. As near as I could.

Q. About how many Master Committee meetings have you attended since last September?

A. I could not say.

Q. Has it been twenty?

A. I don't know. I could not say that.

Q. Has it been a hundred? Just your best judgment. I will not hold you down——

A. I would have to add them up to do that.

Trial Examiner Myers: Go ahead and figure in out in your mind.

A. Oh, we will say twenty.

By Mr. Tucker:

Q. And in those Master Committee meetings you discussed the procedure and what the policy of Local No. 372 organizing the department store employees was to be, is that correct?

A. That is correct.

Q. Did you ever discuss organizing employees in other stores in St. Louis?

A. We did not.

Q. And you confined your discussions and problems you have to face to the Famous-Barr Corporation?

A. That is right.

Q. Do you know anything about any effort being made to organize any other store in St. Louis by the Department Store Employees Union of the CIO?

A. Well——

Mr. Harris: I will object to that as immaterial.

Trial Examiner Myers: Overruled. You may answer.

By Mr. Tucker:

Q. Do you know anything about it?

A. I do not.

Q. Now, then, beginning last September you became a member of this master committee. That is September, 1942?

A. Yes, sir.

[fol. 29] Q. When did you first have the one hundred per cent membership in the Bushelman's Department 280 and 281?

A. I think it was immediately after we started organizing.

Q. Some time in September, 1942?

A. That is right, in that month.

Trial Examiner Myers: And you mean for both departments 280 and 281?

A. Yes, sir.

By Mr. Tucker:

Q. At that time did you consider applying to have Local 372 represent departments 280 and 281 as a separate unit?

A. Yes.

Q. You gave consideration to that at that time?

A. That is right.

Q. As I understand your testimony—did the Master Committee consider that problem?

A. There was a discussion on it, yes.

Q. In the Master Committee of the store?

A. That is right.

Q. And the decision reached then was that there should be no application made to have Departments 280 and 281 get into a separate unit, is that correct?

A. Not at that time.

Q. The decision reached was to go ahead with the attempt to organize the store as a whole?

A. Yes, sir.

Q. All the selling and non-selling departments?

A. That is right.

Q. With certain minor exceptions, is that correct?

A. That is correct.

Q. Which included the Busheling Departments, is that correct?

A. Yes, sir.

Q. That is to say, the decision of the Master Committee which was arrived at after a discussion in the Master Committee of the representatives of the various departments in the store was that you should continue your organizing effort in the store as a whole, is that correct?

A. Yes, sir.

Q. And those organizational efforts were to include all departments in the store with the exception of those who already had American Federation of Labor contracts, and certain confidential employees and executives?

A. That is right.

Q. Now, then, you continued your organizational effort [fol. 30] in the store as a whole after you made that decision in September, is that correct?

A. That is right.

Q. And tried to get memberships throughout the store from September, 1942, until some time in March or April, 1943, isn't that correct?

A. Yes, sir.

Q. And then in March or April, 1942, you decided upon the Master Committee that could ask for recognition of Local 372 as the bargaining agent for a separate unit?

A. That is right.

Q. Made up of departments 280 and 281, which were the men's bushelmen's room on the 2nd floor and the men's alteration department and bushelmen's work in the basement?

A. That is right.

Q. You are still contending that? Your Master Committee is still directing its efforts toward organizing the store as a whole, is it not?

A. We are.

Q. And you continue to have meetings of the Master Committee, do you?

A. Yes, sir.

Q. Weekly?

A. Yes, sir.

Q. Do you still attend those meetings?

A. I do.

Q. Is it the policy of the Master Committee to continue the organizational efforts, all of them as a whole?

A. That is right.

Q. With the object of calling for an election for a store-wide unit?

A. That is right.

Q. You consider the store-wide unit the thing most desirable for the employees of the company, do you not?

A. That is right.

Q. When you pressed those twenty or thirty ladies' coats a few weeks ago, I believe you said that was the first time you had pressed ladies' coats since you had been working in the store. Is that correct?

A. That is right.

Q. Did you have any difficulty in doing the job properly?

A. Being an experienced presser, it just takes maybe a few minutes to catch on to something a little different. It wasn't a very great difference in what I had at that time. It is not a dress, it is a coat, and it isn't a lot of difference between the ladies' coats and the men's coats.

Q. So you did not experience any difficulty in carrying out the instructions to press those coats?

A. Not very much.

Q. Did you have any criticism of your work?

A. I did not at the time, no.

[fol. 31] Trial Examiner Myers: He means did anyone criticise your work?

A. Not so far.

Trial Examiner Myers: Is that what you meant?

Mr. Tucker: Yes, sir.

By Mr. Tucker:

Q. Nobody criticized the way you pressed those ladies' coats?

A. No, they haven't.

Trial Examiner Myers: Did you press all of the coats?

A. Yes, sir.

By Mr. Tucker:

Q. You are the only presser in the department?

A. No, there is another one there.

Q. Now, are you quite certain that in June, 1941, on the occasion when you say the employees of the Busheling room gathered around the table with the foreman and told him they would like to have more money, that everyone of the employees in the Busheling Room got a raise?

A. Well, to my best knowledge, yes.

Q. Well, do you know whether they did or not?

A. I have to ask each separately to find that out.

Q. Did you ask each one separately?

A. I did not.

Q. So you do not know whether they all got raises or not?

A. I take it we were all called down to the office separately and all went on. They were all called down.

Q. Do you know everybody in the department was called down separately?

Do you know of your own knowledge every person in the Busheling Room received a call to go to Mr. Koven's office?

A. I am sure of that.

Q. How do you know that? Did you hear them called?

A. Well, I see them pass me by when they go down. They say "Well, I am going down to Koven's office."

Q. Did everybody say to you, "I am going down to his office"?

A. No, they did not.

Q. They did not.

A. No, sir.

Q. Then you have no way of knowing definitely whether everybody in the Department went down to the office, do you?

A. I can't prove it, no, sir.

Trial Examiner Myers: Which incident are you talking about, the one in June, 1941?

[fol. 32] Mr. Tucker: I am asking about June, but I will ask about the other separately.

Trial Examiner Myers: Is there any dispute about that?

Mr. Tucker: Yes, sir.

Trial Examiner Myers: All right. In June, 1941, do you know if everyone outside of the foreman received a wage increase?

The Witness: I cannot prove that because we were not all down at the same time. Just like I say, we all were called separately. I can't prove that. I just assume we all got a raise at the same time.

Trial Examiner Myers: And the same is true as to the March, 1942 incident?

A. Yes, sir.

By Mr. Tucker:

Q. Then your testimony this morning that everyone in the department got raises in June, 1941, and again in March, 1942, is merely your assumption of what happened, is that correct?

A. Yes, sir.

* * * * * * *

Recross-examination.

By Mr. Wilson:

Q. Can you see the entrance to Mr. Koven's office from the place where you worked?

A. No, sir.

Q. Can you hear what transpires in Mr. Koven's office?

A. No, sir.

Q. You stated it was your opinion that the best unit in the store would be one including employees in the whole store with a certain few exceptions, is that correct?

A. Yes, sir.

Q. Is that also the opinion of the Master Committee?

A. Yes, sir.

Q. Is that the opinion of the Local Union?

A. Yes, sir.

Q. Was the Joint Council in existence at the time you joined Local 372?

A. Yes, sir.

Mr. Wilson: That is all.

Trial Examiner Myers: Any questions, Mr. Tucker?

Mr. Tucker: Yes, sir.

[fol. 33] Recross-examination.

By Mr. Tucker:

Q. When did Local 372 become a member of the Joint Council?

A. That I don't know. I could not answer that.

Q. Have you any idea?

A. I have not.

Q. When was the first time you knew they belonged to the St. Louis Joint Council?

A. I cannot answer that, either.

Q. Was it today?

A. No.

Q. Was it before today?

A. It was before today.

Q. Was it last week?

A. Yes, it was longer ago than that.

Q. How long ago?

A. I could not say.

Trial Examiner Myers: Approximately.

A. I could not say.

Trial Examiner Myers: Was it last month?

A. We will say a month ago. I don't know.

By Mr. Tucker:

Q. Fix your thought on it, and state what your best recollection is. You testified you knew they were members of the Joint Council.

A. Things like that are hard to remember when you have a lot of things on your mind. I cannot say. I try to remember the best I can.

Q. Would you say it was more than a month ago you obtained this knowledge?

A. I think it was.

Q. Was it more than two months?

A. I don't know.

Q. You just don't know at all when it happened?

A. I don't know when I found out. That is what you want to know.

Q. Yes. And you do not know when No. 372 joined the St. Louis Council?

A. I cannot say.

Q. And you cannot recall when you first received notice they had joined the St. Louis Council, is that correct?

A. Yes, sir.

Q. You testify you consider it now desirable Departments 280 and 281 file application to be considered as separate units and to act as a separate unit?

A. That is right.

Q. What reason is there now that is more desirable, [fol. 34] if it is more desirable, than it was in the Fall of 1942 when you decided to go along with the storewide unit?

A. Well, we just simply made up our minds we did not want to wait any longer, that is all.

Q. There isn't any other reason?

A. No, sir.

* * * * * * *

HENRY SCHERER, a witness called by and on behalf of the Petitioning Union, being first duly sworn, was examined and testified as follows:

Direct examination.

Trial Examiner Myers: State your name.

A. Henry Scherer.

Trial Examiner Myers: Where do you live?

A. 2702 Arsenal.

Trial Examiner Myers: St. Louis?

A. St. Louis, Mo.

Trial Examiner Myers: You may be seated. You may proceed, Mr. Harris.

Mr. Harris.

Q. What is your occupation, please?

A. I am a representative of the Amalgamated Clothing Workers.

Q. That is a labor organization?

A. Yes, sir.

Q. Affiliated with the CIO?

A. Yes, sir.

Q. What is the jurisdiction of that organization?

A. The jurisdiction?

Q. Yes.

A. Well, it takes in ready made work, factory work, journeyman tailors, custom made clothes, bushelmen's department, retail stores and so on.

Q. What is the difference between your organization and the International Ladies Garment Workers Union?

A. Well, so far as the International Ladies Garment Workers Union, it is an organization that caters more to the ladies' industries, such as dresses, underwear and so on. Our organization is more or less the men's clothing.

Q. Is it correct, generally speaking, to say that the dif- [fol. 35] ference is your organization deals with those who work on or sell men's clothing, and the International Ladies Garment Workers Union deals with those who work on or sell women's clothing?

A. That is right.

Q. How long have you been connected with the Amalgamated Clothing Workers?

A. As a representative of the organization, I have been connected with them since 1938.

* * * * * * *

By Mr. Tucker:

Q. These stores you testified about, Bonds, Werner & Hilton, Frank Hilton, Roberts, Taylor & Windsor Tailoring Company, do I understand you now have contracts with those stores with the Amalgamated?

A. Yes, sir.

Q. And none of those are department stores, are they?

A. They are considered more or less retail stores.

Q. They are specialty stores or straight tailoring establishments?

A. Not necessarily, they sell clothing and have bushelmen doing the alterations.

Q. Specifically, Roberts Tailoring Company and Windsor Tailoring Company don't do anything but manufacture and sell men's clothes?

A. That is right.

Q. And Bond's, Werner & Hilton and Frank Hilton are retail clothing stores, they have haberdashery in the store?

A. That is right.

Q. They are not any of them department stores in any sense of the word?

A. They don't call themselves department stores.

Q. They are not department stores in any manner such as Famoux & Barr, Scruggs, or Stix Baer & Fuller, are they?

A. No, sir.

Q. Bonds do sell women's clothing, do they not?

A. They are selling women's clothing now, yes, for the duration.

Q. And it is only recently that you obtained a contract with Bonds, isn't it?

A. No, sir.

Q. In St. Louis?

A. We have had a contract with Bonds for four or five years.

[fol. 36] Your members in Bonds are working on women's clothes, are they not?

A. Some of these women's coats, yes.

Q. Your people do all the alteration in Bonds, don't they?

A. That is right.

Q. And the members of your union make alterations of women's garments sold at Bonds?

A. Whatever alterations they are.

Q. That consists of women's dresses and coats?

A. Not dresses.

Q. Women's coats and suits?

A. There are no suits, all Bonds are selling is coats.

Q. Your members do make the coat alterations?

A. They do all the alteration that is done, they only have one alteration department.

Q. They are in the same unit in the store, people who do the women's alterations at Bonds are in the same unit as the men who are doing the men's alterations?

A. That is right, they only have one unit.

Q. And the same people do the men's and women's alteration at Bonds?

A. That is right.

Q. Do Werner and Hilton and Frank Hilton handle women's clothing at all?

A. No, in fact Bonds has not handled it either until recently he put in a line of women's clothing for the duration, naturally after the war is over he will do away with that too.

Trial Examiner Myers: We don't know about that.

By Mr. Tucker:

Q. Did Bond tell you that?
A. No, sir.

Trial Examiner Myers: It depends whether it is profitable, he might throw out the men's clothes.

By Mr. Tucker:

Q. You testified, I believe, some years ago all the department store bushelmen's rooms were organized by either the Amalgamated or its predecessor union, is that correct?
A. By the journeymen tailors.
Q. The Journeymen Tailor's Union Local 11 was the predecessor of the present Amalgamated Union, is that correct, here in St. Louis?
A. That is right.
Q. And it was your testimony that this Journeymen's [fol. 37] Tailors Union Local 11 had organized all the department store busheling rooms here in St. Louis?
A. Yes, sir.
Q. What year was that?
A. Well, they were organized, I don't know what time it was when they organized the bushelmen in these stores but I know they were organized in 1919 up to 1920.
Q. It was around 1919 or 1920 you had reference to?
A. That is right.

Trial Examiner Myers: Was Famous-Barr organized?
A. Yes, sir.
Trial Examiner Myers: The bushelmen?
A. Yes, sir.

By Mr. Tucker:

Q. Did that include the bushelmen in the basement as well as those on the first floor?
A. I don't know that they had a basement, the men's department was organized, I don't know about the ladies' department.
Q. You are referring to the women's alteration department?
A. That is right.

* * * * * * *

EMMANUEL BOGGS, a witness called by and on behalf of the Petitioning Union, being first duly sworn, was examined and testified as follows:

Direct examination.

Trial Examiner Myers: What is your name?

A. Emmanuel Boggs.

Trial Examiner Myers: Where do you live, Mr. Boggs?

A. 4924-a Fountain Avenue, St. Louis, Mo.

Trial Examiner Myers: You may be seated. You may proceed, Mr. Harris.

By Mr. Harris:

Q. What is your occupation?

A. I am a representative of the St. Louis Joint Council, United Retail, Wholesale & Department Store Employees Union of America, CIO.

Q. What is the St. Louis Joint Council?

[fol. 38] A. The St. Louis Joint Council is an organization composed of all of the Local Unions and plants organized by the United Retail, Wholesale & Department Store Employees Union in the St. Louis area.

Q. Are Unions of the United Retail, Wholesale & Department Store employees affiliated with the St. Louis Joint Council?

A. The St. Louis Joint Council is affiliated with the U. O. W. & S. E. of A.

* * * * * * * *

Now, at this point, Mr. Tucker, could you state for the record the number of employees in the Company's employ?

Mr. Tucker: Well, I will say approximately five thousand. That is what is used in the petition for certification, and I think that is close enough for the purposes of this question.

Trial Examiner Myers: You think we should have it broken down into selling employees and non-selling employees?

Mr. Tucker: I do not see any occasion to break it down.

Trial Examiner Myers: What do you say, Mr. Harris?

Mr. Harris: I do not think it is necessary. I think it is set out in the Board's previous decision. Can we agree that

the facts, Mr. Tucker, are substantially the same now with regard to the number of employees that they were at the time of the Famous decision?

Mr. Tucker: Yes. Whatever little change is indicated in the number, the percentages will remain the same.

Trial Examiner Myers: It is so stipulated?

Mr. Tucker: Yes, sir.

Trial Examiner Myers: And by you, Mr. Harris?

Mr. Harris: Yes, sir.

Trial Examiner Myers: And Mr. Wilson?

Mr. Wilson: I will so stipulate.

[fol. 39] Trial Examiner Myers: Are you ready to proceed with your case?

Mr. Wilson: I want to state the Intervener feels the evidence which has been put in on direct examination and by cross examination of the Petitioning Union's witnesses is sufficient upon which to base his case.

Trial Examiner Myers: And you have no witnesses?

Mr. Wilson: No, sir. The Intervener will call no witnesses, but will move to dismiss the petition on the basis it is an inappropriate bargaining unit.

Trial Examiner Myers: You are making that motion now?

Mr. Wilson: Yes, I am making the motion now.

Trial Examiner Myers: I cannot rule on that motion but I will submit it to the Board for its consideration.

Are you ready, Mr. Tucker?

Mr. Tucker: Yes, sir. I will call Mr. W[illegible]er. Will you take the stand, please?

JOHN WEBER, a witness called by and on behalf of the Company, being first duly sworn, was examined and testified as follows:

Direct examination.

Trial Examiner Myers: What is your name?

A. John Weber.

Trial Examiner Myers: Please spell your name.

A. W-e-b-e-r.

Trial Examiner Myers: Where do you live?

A. 8 Northdale, Baden Station.

Trial Examiner Myers: You may be seated.

By Mr. Tucker:

Q. Now, you will have to talk louder than your usual tone of voice, for this is a large room. What is your occupation?

A. I am a tailor.

Q. Where are you employed?

A. Famous-Barr.

[fol.40] Q. Are you the foreman of the basement bushelling room?

A. That is right.

Q. Known as Department 281?

A. That is right.

Q. How many employees do you have in that department in the busy season?

A. Well, it all depends. Usually I would say ten to twenty before Easter and other seasons.

Q. And it would run as high as twenty in a busy season?

A. Yes, sir, we have had up to twenty already.

Q. At the present time you are not very busy?

A. No.

Q. And have only two?

A. Only two besides myself.

Trial Examiner Myers: In the busier seasons you have between ten and twenty?

A. Yes, sir.

Trial Examiner Myers: And usually about one besides yourself?

A. Two besides myself. Three altogether.

By Mr. Tucker:

Q. I did not understand you to testify usually there were only three. Is that correct, you usually have only three?

A. Yes, sir, three regulars including myself.

Q. Is that in the dull season you have only three?

A. Yes, sir.

Q. How many do you usually have in that department?

A. That is three.

Q. Three is what you usually have?

A. Yes, sir.

Q. Now, prior to your going to work for the Famous, did you have your own business?

A. Yes, I had my own business.

Q. And what was that business?

A. Tailoring business.

Q. Men's or ladies?

A. Men's and ladies.

Q. In the same shop you made both men's and women's clothes?

A. Yes, sir.

Q. And altered both men's and women's clothes?

A. Yes, sir.

Q. Did you work personally on both kinds of garments?

A. I did.

Q. Did you have others working there with you?

A. At times I had, yes.

Q. At times you did have help in your own shop?

A. Yes.

[fol. 41] Q. Did the help work both on ladies and mens garments?

A. That is right.

Q. Now, have you also worked on the second floor bushéling room, Department 280 at the Famous-Barr?

A. Yes, sir.

Q. And are familiar with the operations there?

A. Yes, sir.

Q. You have fitters, markers, tailors, tailoresses, finishers, pressers, operators, examiners and a ripper? You have those classes of work done in your department?

A. Well, yes. Naturally I do the marking and fitting, the marking in the shop, myself. Those I have to do the operations, they can come and finish at the same time, you know.

Q. In the second floor Department 280, do they have the classes of workmen that you mentioned?

A. Yes, they have.

Q. All those classes?

A. That is right.

Q. And in your basement department the same kind of work is done except you do not have as many people to do it?

A. That is right.

Q. The work is divided up? All three people do those classes of work?

A. Yes, sir. Suppose we are busy, we have others, too, we have fitters and finishers.

Q. When not so busy, the three people do all these classes of work?

A. That is right.

Q. Do they have substantially the same classes of work in the women's alteration department in the Famous-Barr?

A. Well, yes, they do.

Q. Would a person who is qualified as a fitter, marker or tailor or any one of these other classes of employment in the men's busheling room be able to do that same type of work in the women's alteration department at Famous, in your opinion?

A. Well, a fitter—I would not say he could do both of them, not every fitter.

Q. I mean a well qualified fitter.

A. He probably could do it. An experienced fitter could do it.

Q. He would have the ability to fit in either department, is that correct?

A. Yes.

[fol. 42] Q. And the same thing would be true of other different classifications of employment such as markers, tailors, tailoresses and so on?

A. Yes.

Q. They could do that same type of work in either department?

A. Yes, they could do that.

Q. Do you work under the direction of Mr. Loeb?

A. Right.

Q. Mr. Harry Loeb?

A. He is the buyer for the men's clothing department in the basement.

Q. Do you work under his supervision?

A. Yes.

Q. When a man comes in to buy a suit of clothes in the basement, the salesman makes the sale, does he, first?

A. That is right.

Q. Then you are called over to check on the necessary alterations?

A. That is right.

Q. And the salesman stands there with the customer?

A. That is right.

Q. And with you, is that right?

A. That is right.

Q. And you all participate in the discussion as to what alterations are needed?

A. That is correct.

Q. Is any charge made to the customer for those alterations?

A. Usually not, see? There are certain exceptions. Suits on sale, sometimes a charge will be made, see?

Q. If there is a very exceptional sale of some kind?

A. Yes, sir.

Q. Ordinarily, unless there are some exceptional circumstances, no alteration charge is made, is that correct?

A. No, that is right.

Q. Do you do alterations for strangers who come in the store and want their clothes altered?

A. No, sir, we do not.

Q. You do not?

A. No.

Q. Your only alterations, then, are in connection with the sale of your own merchandise, is that right?

A. Yes, that is right.

Q. To make them fit the customer?

A. Yes, sir.

Q. Now, is there anybody else who supervises your work besides Mr. Loeb? Is he the only boss you have?

A. Yes, that is right.

Q. Now, when the customer—when you have marked up [fol. 43] and decided with the customer and the salesman on what alterations are needed on the suit of clothes or pants or whatever garment it is that is sold in the basement of the clothing department, then the alterations are made, and sometimes the customer comes back, does he, to try the garment on, or the suit or overcoat?

A. He does.

Q. When he comes back, do you sometimes see him without the salesman?

A. Yes, I do. Of course, somebody has to call me out if the certain salesman is not there. But they can turn him over to me then, see?

Q. Where does the customer come when he wants to see how his clothes will fit after he has bought them and has them fitted?

A. He probably will try to get his salesman first.

Q. If the salesman happens to be out, he will come to some window where you will be found?

A. No, he looks for somebody else, maybe the buyer, Mr. Loeb himself, or the assistant buyer.

Q. Or some other salesman, and asks for his clothing, is that right?

A. That is right.

Q. Isn't there a "Will Call" department or place where a customer would come to some window in the alteration department in the basement?

A. Not in the basement. On the second floor there is.

Q. In the basement they just come and look for the salesman who sold the suit, or some salesman, or the buyer?

A. That is right.

Q. And that person, whoever he reaches, will call you?

A. That is right.

Q. And that person, whoever he reaches, will call you?

A. That is right.

Q. And you will come out and see whether the garment fits properly or not and make further alterations if necessary?

A. That is right.

Mr. Tucker: I think that is all.

Trial Examiner Myers: Any questions, Mr. Harris?

Mr. Harris: Yes, sir.

[fol. 44] Cross-examination.

By Mr. Harris:

Q. How long have you been employed at Famous-Barr?

A. About fifteen years.

Q. You had your own tailoring shop before that?

A. Yes, sir.

Q. Where was that located?

A. 6011 Chouteau Avenue.

Q. How large a shop was it?

A. Just myself, see? Then I had a bigger shop in Germany.

Q. In Germany you had a larger shop?

A. Yes, sir, I had my place there.

Q. You followed your trade in Germany?

A. Yes, sir.

Q. And your trade is what?

A. Tailor.

Q. That is considered a regular trade?

A. Custom tailor, yes.

Q. Your shop you had on Chouteau, was that a small shop or a large one?

A. Small shop.

Q. You did most of the work yourself, or all of it?
A. I did most of the work myself.
Q. You worked on what type of clothing, all types?
A. Yes, sir.
Q. Men and women's?
A. That is right.
Q. How many years of experience have you had working on all types of garments?
A. Since 1911.
Q. Since 1911?
A. Yes, sir, that is when I started.
Q. Have you always worked on both men's and women's clothing?
A. That is right.
Q. Have you ever worked in any other department store than in Famous-Barr?
A. I used to work for a while, for a short time, at Weil's.
Q. In what department?
A. In the basement.
Q. What did you do at Weil's?
A. Bushelman, the same thing.
Q. Were you a tailor, or what?
A. Tailor, yes.
Q. What type of clothing did you work on then?
A. Men's suits.
Q. Since you have been at Famous, what type of clothing have you worked on?
A. Men's suits.
Q. Men's suits only?
A. Yes, sir.
Q. You have never worked on women's?
A. Not at all, not there.
[fol. 45] Q. You said a well qualified fitter could perhaps work on both men's and women's clothing. What do you mean by well qualified fitter?
A. Well, a tailor with years of experience like myself. He could do it. A good tailor could do it, except dresses. I am not talking about dresses, but ladies' suits.
Q. Even a good tailor could not work on ladies' dresses?
A. Well, he could, but I would not say that is his job, you see.
Q. That is not considered part of his trade?
A. No.

Q. When you said a well qualified fitter could work on men's and women's garments, you meant on men's and women's suits?

A. He could fit them, I should say.

Q. He could fit them?

A. Yes.

Q. Suppose he never had any experience in fitting women's clothes, and his experience had been limited to fitting men's clothes.

A. Yes.

Q. Could he go right out on the floor and fit women's clothes?

A. Oh, yes, I guess he could.

Q. Sir?

A. He could work. He specializes in men's clothes, but he would be able to fit ladies too.

Q. Could he do a good job of it, or would it take a while to learn it?

A. I think he would do all right. It all depends on the man, of course.

Trial Examiner Myers: You are talking about women's coats and suits?

A. Yes, sir.

Trial Examiner Myers. You are not talking about dresses?

A. Not about dresses, no.

By Mr. Harris:

Q. Would that same thing be true for markers?

A. For markers, it is, yes, except on skirts I would not know it. He probably could do it. There isn't much to do there for a tailor.

Q. Would he be able to work on dresses?

A. No, I don't think so.

Q. You think a marker, an experienced marker on men's suits, could work on women's suits?

A. Yes.

[fol. 46] Q. And would the same thing be true of tailors?

A. For tailors, especially for tailors.

Q. Especially for tailors?

A. Yes.

Q. Do you think an experienced tailor on men's suits could work on women's suits?

A. So far as alterations are concerned.

Q. But not on dresses?
A. Not on dresses.
Q. Have you ever belonged to any union?
A. No, sir.
Q. Either in Germany or here?
A. In Germany, yes.
Q. What union did you belong to there?
A. The Tailors Union, Social Democratic.
Q. The Tailors Union?
A. Yes, sir.
Q. What exactly is your job in Department 281? Actually what do you do?
A. I mark. I fit first and mark.
Q. Are you the fellow who comes out on the floor, if I go down and buy a suit?
A. That is right.
Q. And if it doesn't fit me, which it never does, you are the man who comes out and makes the mark on me?
A. That is right.

Trial Examiner Myers: Not on you, on your clothes.
Mr. Harris: Sometimes on me.

By Mr. Harris:

Q. You do not have anything to do with the selling of suits?
A. No, no selling.
Q. And you do not discuss it with the customer at all?
A. No.
Q. All you do is make the marks so that it can be altered to fit the customer?
A. That is right.
Q. That is your only contact with the customer?
A. Yes.
Q. Does the customer have any independent access to you except as you are called out on the floor by a salesman or buyer or someone like that?
A. No, that is all.
Q. There is no charge for alteration, you said, except in special cases?
A. That is right.
Q. I am not clear on what the special cases are.
A. Well, on special sales, you see.

Q. Where a suit has been reduced in price?

A. That is right, too. Certain prices, and then we make alteration charges for it.

[fol. 47] Q. Is that customary where suits have been reduced in price to make a charge for alterations? I mean is that usually done?

A. Yes, it is.

Q. It is usually done?

A. Yes, sir.

Q. I mean it is usually done in your department?

A. Yes.

Mr. Harris: That is all.

Trial Examiner Myers: Mr. Wilson, do you have any questions?

Mr. Wilson: Yes.

Cross-examination.

By Mr. Wilson:

Q. If the selling department of Famous-Barr should close down, or they should discontinue the selling department on men's suits, would there be any work for the bushelmen?

A. I guess we could sell them ourselves, the suits.

Q. But if they discontinued the handling of men's suits, or if the salesmen went on strike, would there be any work for the bushelmen?

A. Of course there would not be, you see, unless we would sell them ourselves.

Mr. Wilson: That is all the questions I have.

Mr. Tucker: I have a question or two more.

Redirect Examination.

By Mr. Tucker:

Q. The Weil Clothing Company, at the time you worked there, handled only men's clothing?

A. They did.

Q. What is the difference between the custom tailor and the bushelman?

A. The custom tailor makes new suits and the bushelman alters them.

Q. The custom tailor makes suits and the bushelman alters them?

A. Yes, sir.

Trial Examiner Myers: Isn't there a classification of tailoring people who work in the manufacture of men's suits known as bushelmen, who only confine their work to the coats, the fixing of the collar, and the shoulders and [fol. 48] the arms? Are they called bushelman? I always had that impression.

A. I don't know whether they are or not.

Trial Examiner Myers: I had that impression. Maybe I am wrong.

By Mr. Tucker:

Q. You testified about the tailor being able to alter men's and women's suit equally well?

A. Yes.

Q. Whether a man or a woman tailor, the one working in the busheling department or the ladies' alteration, you meant that to apply to coats as well as suits, didn't you?

A. Yes, sir.

Q. It was coats and heavier garments, is that right?

A. Yes, sir.

Q. In general, I wonder if it is correct to say that the distinction between the heavier fabric, the wool fabric, which the coats and suits are usually made out of, and the dress fabrics, which are much lighter materials—is that what you had in mind?

A. No, sir. A dress is entirely different from a coat again, you see. It is different in fabric, too. It is heavier material, and a dress is something different than a suit.

Q. Does it require more training to alter dresses than it does suits and coats?

A. I would say it takes more time on suits.

Q. More training to learn to alter suits than dresses, is that right?

A. Yes.

Trial Examiner Myers: It is altogether a different training, isn't it?

A. Yes, it is a different trade, you see.

By Mr. Tucker:

Q. Sometimes when a customer comes in to try on a suit, does he ask your opinion whether you think it fits right or not?

A. He does.

Q. Sometimes doesn't he ask how you think it looks on him?

A. Yes.

Q. And sometimes aren't they dissatisfied with the selection they made and are about to back out of the deal, doesn't that happen?

A. Yes, it happens.

Q. And don't you sort of help convince him it looks all right on him and fits him all right and he should keep it?

A. Well, yes.

[fol. 49] Q. You do?

A. Yes, you do not want to kill a sale.

Q. And you help keep him satisfied?

A. Yes, sir, that is right.

Q. Now, then, when you work on the 2nd floor, as I understand it, there is a rail or window up there, a long rail similar to the one here in this Court Room, and customers frequently come direct to that rail without calling the salesman and say to the girl attendant there, "My name is Jones, and I have a suit here being altered and would like to try it on." Do they do that?

A. Yes, sir.

Mr. Harris: I object to this as leading and suggestive. I have refrained for quite some time.

Trial Examiner Myers: I will overrule it at this time.

Mr. Tucker: Well, I can go all through that, if you want me to.

Trial Examiner Myers: I have overruled the objection. He said yes.

Mr. Harris: He has already answered it.

By Mr. Tucker:

Q. Did I understand your answer to be that is done without a salesman being present upon occasions?

A. Yes, people come up for suits at the "Will Call Desk."

Q. Do they try them on again?

A. If they want to try them on there, then they call for the salesman or tailor.

Q. Do they sometimes try them on without a salesman being called?

A. Yes, sir.

Q. And they discuss with the fitter then whether the suit is all right, and make their complaints to the fitter?

A. Yes, sir.

Q. Now, did you mean to testify that in any case when there is a reduction in the price of suits there is a charge for alteration, or is it only in connection with substantial or extra reductions that there is a charge?

A. Yes, sir, extra reduction.

Q. And when there is to be a charge made for alterations, that is always advertised separately?

A. Yes.

Q. And that is unusual?

A. Yes.

Mr. Tucker: That is all.

[fol. 50] Trial Examiner Myers: What kind of shop did you have when you were in business for yourself? Was it one of these little neighborhood tailor shops?

A. Yes, you might call it that.

Q. And the people in the neighborhood would bring their clothes there to be repaired and pressed?

A. Yes, sir.

Q. And dry cleaned?

A. We did not do any cleaning.

Q. If it was necessary for dry cleaning, you would send them out?

A. That is right.

Q. You would take the garment in and send it to a dry cleaner to be dry cleaned?

A. I never did that, sir. I just did tailoring.

Q. You did not do any pressing?

A. No, sir.

Q. Just tailoring?

A. Yes, sir.

Q. And altering?

A. Yes, sir.

Q. Now, can a tailor or bushelman in the alterations department, men's alterations department, could he alter women's clothes?

A. Yes, he could.

Q. You said he could fit. I wanted to know whether he could alter?

A. He mainly alters rather than fits.

Q. What?

A. Altering rather than fitting, you see.

Q. But when it comes to dresses, it needs a dressmaker?

A. Yes, sir.

Trial Examiner Myers: Any further questions?

By Mr. Tucker:

Q. In your own shop, you did the same kind of work—that is, you cut down clothes or rebuilt them the same as you do in the busheling department?

A. Yes, and make them new right off the bolt.

Q. If a father brought in a suit he wanted his son to wear, and you had to cut it down, and remake it, you did that?

A. Yes, sir.

Q. Just as complicated work as you did in the busheling department?

A. Yes, sir.

Q. And you did that for both men and women?

A. Yes, sir.

Trial Examiner Myers: What did you call yourself, a custom tailor, when in business for yourself?

A. Yes, sir.

Trial Examiner Myers: And you made suits?

A. Yes, I did.

[fol. 51] Trial Examiner Myers: As well as alter?

A. That is right?

Mr. Tucker: That is all.

Recross-examination.

By Mr. Harris:

Q. I am not quite clear on this. When you were in Department 280, you said customers got suits up there, or did you say you got them at the "Will Call" department?

A. Yes, they have a "Will Call" desk there, you see.

Q. Where is the "Will Call" desk?

A. Underneath the tailor shop there.

Q. On the second floor?

A. Yes, sir.

Q. Not on the balcony?

A. No, right on the floor where they sell clothes.

Trial Examiner Myers: That is where they call for any merchandise?

A. That is right. They have the Alteration Department——

Trial Examiner Myers: A suit of clothes or a pair of shoes?

A. Oh, no.

Trial Examiner Myers: Just for suits?

A. Only for suits.

Trial Examiner Myers: And overcoats?

A. That is right.

By Mr. Tucker:

Q. Only for men's clothes?

A. That is right. What they have sold in the men's department.

By Mr. Harris:

Q. It might be any kind of men's clothing sold on the second floor?

A. No shirts and things like that, just suits and coats, you see.

Q. And that is where they go to get their suits?

A. That is right.

Q. If they want to try them on, where would they go?

A. In one of those fitting rooms.

Q. Where is the fitting room?

A. Right close to them on both sides. One side, and the other side across the floor.

Q. That is all on the second floor?

A. Yes, sir, in the same place.

[fol. 52] Q. If they want to get somebody from the busheling room, how do they get them?

A. Well, those fitters are on the floor, you see, right around there.

Q. There are fitters on the floor they can see?

A. Yes, sir, they are handy there.

Q. They do not go upstairs to the busheling room themselves, do they?

A. Not the main fitters. Sometimes they come down and help out.

Q. The customers never go up there?
A. Oh, no, no, no.
Q. They just see the fitter on the floor there?
A. That is right.
Q. If a suit is brought back for extra alteration, is there a charge for that?
A. No.
Q. No additional charge for that?
A. No, there isn't.

Mr. Harris: I think that is all.
Trial Examiner Myers: Any other questions?
Mr. Tucker: Another question or two.

Redirect examination.

By Mr. Tucker:

Q. The fitters on the second floor busheling department are there on the floor all of the time?
A. Yes, sir, most of them, yes. In an emergency they call some down from the shop.
Q. In an emergency?
A. Yes.
Q. But there are always at least one fitter on the floor, on the second floor?
A. That is right.
Q. Outside of the busheling room?
A. That is right.
Q. Who is the superintendent or foreman in charge of Department 280?
A. Mr. Derret.
Q. How do you spell that?
A. D-e-r-r-e-t.
Q. Do you know whether he is sick now?
A. Yes, he is sick.
Q. How long has he been sick?
A. I think about two weeks now.

Mr. Tucker: That is all.
Trial examiner Myers: Any questions, Mr. Wilson?
Mr. Wilson: No questions.
Trial Examiner Myers: Off the record.

(Discussion off the record.)

Trial Examiner Myers: On the record.
Mr. Harris: That is all.
Trial Examiner Myers: You may be excused.

(Witness excused.)

Mr. Wilson: May it please the Examiner, this morning there was some discussion about the stipulation——
Mr. Tucker: These people are busy.
Mr. Wilson: I want to try to catch a train.
Mr. Tucker: These witnesses will not take long.
Mr. Wilson: All right, I will bring it up later. It should be brought up at the end of the hearing.

JETTE KOFF, a witness called by and on behalf of the Company, being first duly sworn, was examined and testified as follows:

Direct examination.

Trial Examiner Myers: What is your name?
A. Jette Koff.
Trial Examiner Myers: Where do you live?
A. 2017 South Gale, St. Louis, Mo.
Trial Examiner Myers: You may proceed, Mr. Tucker.

By Mr. Tucker:

Q. Where are you employed?
A. Famous-Barr Company.
Q. How long have you been employed there?
A. I don't want to tell.
Q. Over twenty years?
[fol. 54] A. Over twenty years. I have had charge of the alterations for thirty-five years.
Q. Thirty-five years?
A. Yes, sir.
Q. That is the women's alterations.
A. Yes, sir, women's alterations.
Q. Do you have under you in that women's alterations department fitters and markers and tailors and tailoresses and pressers and operators and examiners?
A. We do not have any markers.

Q. One of the other people there does the marking?

A. No, the fitters do their pinning and I do not have any markers.

Q. And somebody there does the fitting and the ripping where necessary?

A. No, we have no rippers and everybody finishes their own garment.

Q. Somebody does the finishing?

A. Yes, but no special rippers.

Mr. Harris: What was that question and answer?

(Question and answer read by the Reporter.)

By Mr. Tucker:

Q. Whatever ripping is necessary is done by one of the people in the department there?

A. Yes, sir.

Q. You are familiar with the operations in the men's bushheling departments, are you, and how they operate there?

A. I am.

Q. Is it your opinion that the people that are employed in your department under these different classifications as mentioned could do the similar class of work in men's alteration or busheling department?

A. It is.

Mr. Tucker: That is all.

Trial Examiner Myers: Any questions, Mr. Harris?

Mr. Harris: Yes.

Cross-examination.

By Mr. Harris:

Q. You have no fitters, you say?

A. Yes, we have fitters.

Q. You have fitters, but no markers?

Trial Examiner Myers: They use pins instead of marking?

[fol. 55] A. Yes. In the ladies' operations we use pins entirely while in men's operations they use chalk to mark.

By Mr. Harris:

Q. You mean if a garment is fitted on a customer——

A. The men's tailors chalk it up and put a chalk mark, and the women's leave pins, that is the difference, they call that marking.

Q. Whatever you call it, in any event it is done by pins?
A. Yes, sir.
Q. And the fitters do that?
A. The fitters.
Q. Is that done on the floor?
A. On the floor.
Q. Where is that done?
A. On the fourth floor.
Q. I want to ask you if that is where your department is located?
A. No, we are on the eleventh floor.
Q. Your department is on the eleventh floor?
A. Yes, sir.
Q. Where are the fitters located?
A. Some fitters are on the fourth floor and some on the eleventh floor.
Q. Where is the women's selling department for dresses and coats?
A. Fourth floor.
Q. How many fitters are located down there?
A. They change off. We have fitters that are on the floor two days and pin up the garments and the next two days they are on the eleventh floor. We fit in two shifts. Then they fit upon the eleventh floor for two days.
Q. You mean they pin up the garments and then actually go upstairs and work on the goods?
A. No, the girls do. They do nothing but fitting.

Trial Examiner Myers: Do you sell merchandise on the fourth floor?
A. Yes, sir.

Trial Examiner Myers: And that is fitted for the first time on that floor?
A. Yes, sir.

Trial Examiner Myers: When the customer comes back to see that the garment fits after the alteration has been made, she goes up to the eleventh floor?
A. Yes, sir.

By Mr. Harris:

Q. Ordinarily would they see the same person who fitted them originally?
A. Always.

Q. They always see the same person?

A. Always the same one.

[fol. 56] Q. How many fitters do you have on the fourth floor at a time?

A. About eight, or six to seven.

Q. Are they men?

A. All women.

Q. What type of fitting work do they do? I mean what type of garments?

A. All tailored garments—if you are talking about tailored garments, we have eight fitters who do that, four on each shift. Then we have some fitters that fit dresses mostly, only dresses.

Q. I think you misunders-ood my question. How many fitters do you have on the fourth floor all the time?

A. Six.

Q. Do these six all work on the same kind of garments?

A. Yes.

Q. They all work on dresses, coats and suits?

A. Anything that is sold, or skirts, anything sold on the fourth floor.

Q. And they are all women?

A. All women.

Q. Part of the time they work down there and part of the time work up on the eleventh floor?

A. They pin up on the floor two days, and when a customer comes in the customer comes on the eleventh floor and they are fitted up there. They are not fitted on the fourth floor.

Q. The customer sees the same fitter she saw downstairs?

A. Yes.

Q. Does she come up there to try on the garment after it has been altered?

A. She comes up for a basting fitting, and if she wants to try it on finished, comes for the finished fitting.

Q. Which is more common, the basting fitting or the finish fitting?

A. Finish fitting is trying on to see if the garment is perfect is all.

Q. My question was, do most customers ask for finish fitting the first time or do they have a basting fitting?

A. Basting fitting.

Q. Ordinarily in men's alterations there isn't any such thing as a basting fitting?

A. No, they finish up most of the garments.

Q. They take one crack at it, and if they do not get it right the customers complains, is that it?

A. Yes, sir.

[fol. 57] Q. You do not have any men who do this fitting work on women's clothing?

A. No.

Q. There are no women doing fitting on men's clothing?

A. Well, I don't think they have any women down on the second floor fitting.

Q. Ordinarily that would not be done, a woman fitting a man's suit, and a man fitting a woman's dress?

A. There are a lot of men fitting women's suits.

Q. But you do not have any at Famous?

A. We do not have any.

Q. Are there any men who fit women's dresses?

A. I suppose there are some, but I don't know of any.

Trial Examiner Myers: You mean you do not know of any at Famous-Barr?

A. No, not at Famous-Barr.

By Mr. Harris:

Q. Do you have finishers in your department?

A. Well, I suppose you would call them finishers. We give a girl a garment, they tailor the coat and the skirt and do the garment entirely. They do the alteration and the finishing, and finish it all up.

Q. I think you said everybody there is on finishing?

A. Yes, is on finishing. We do not have any special finishers like they do on the second floor.

Q. Like they do in the men's department?

A. No.

Q. These fitters that are down on the fourth floor, is that a skilled job?

A. Why, sure.

Q. How many years of training does it take to become a skilled fitter?

A. Some a very short time and others take a little longer.

Q. What would you say would be the average time?

A. I have had some girls less than six months.

Q. And you have had some longer?

A. Yes.

Q. Can you give us the average? Not what an unusually fast person or unusually slow one would take.

A. No, that I could not. I could not give an estimate.

Would you say at least six months for an unusually competent person?

A. I would say six months.

Q. Do you have what is known as tailors, the same as men do?

A. We have tailors and have tailoresses.

[fol. 58] Q. You have both men and women who do tailoring work?

A. Yes, sir.

Q. What type of garment do they work on?

A. On suits, coats and suits.

Q. Do they work on dresses?

A. Some of them can. Tailor work is their work.

Q. Ordinarily they work on suits and coats?

A. Suits and coats and skirts, tailored skirts.

Q. Who works on dresses?

A. Other girls, separate girls.

Q. Do they do any work on suits and coats?

A. No.

Q. Is that a skilled job, working on dresses?

A. Just the same as a skilled tailor.

Q. Do they have any title? Are they referred to as dressmakers?

A. We call them gown hands. A dressmaker is the one who makes the clothes from the start. She is called a dressmaker. She makes the garment new, and is a dressmaker. Alteration hands are called gown hands.

Q. And the people who work on coats and suits, they are not called gown hands?

A. They are tailoresses and tailors.

Q. Are you a tailor or a tailoress, yourself?

A. Five years I worked on coats in the alteration department.

Q. Where, at Famous Barr?

A. Famous-Barr. I haven't worked anywhere else.

Q. Have you ever been a member of a union?

A. No, sir.

Mr. Harris: That is all.

Trial Examiner Myers: Any questions, Mr. Wilson?

Mr. Wilson: I would like to ask a question.

Cross-examination.

By Mr. Wilson:

Q. Would it be quite proper for men to go into the women's dressing rooms to do fittings?

A. It is being done. We do not happen to have a man, but we have had them.

Q. Does Famous-Barr sell any women's slacks?

A. Yes, sir.

[fol. 59] Q. Who works on those alterations?

A. The fitters and the girls in the room.

Q. Tailors?

A. Tailors and tailoresses.

Mr. Wilson: That is all I have.

Redirect examination.

By Mr. Tucker:

Q. Did you say you have both male and female employees in the women's alteration department?

A. Yes, sir.

Q. And that you have had men fitters in the women's alteration department?

A. Yes, sir.

Q. Are there both men and women employed in the men's busheling department?

A. Yes, sir. In the busheling departments?

Q. Yes.

A. Yes.

Q. And in the marking of coats and suits with pins, are the pins placed the same way and cross pins indicate the same thing as the cross marks indicate when the marking is done with chalk?

A. The same thing.

Q. The putting of pins or chalk in a certain design or certain location has the same significance whether with a pin or chalk?

A. The same thing.

Q. And somebody who is in the work room could see the garment marked either with pins or chalk and would be able to interpret those markings just the same?

A. Just the same.

Mr. Tucker: That is all.

Trial Examiner Myers: Any questions, Mr. Harris?

Mr. Harris: No more.

Trial Examiner Myers: You are excused. Thank you very much.

(Witness excused).

[fol. 60] Mr. Tucker: Mr. Schwartz.

HAROLD L. SWARTZ, a witness called by and on behalf of the Company, being first duly sworn, was examined and testified as follows:

Direct examination.

Trial Examiner Myers: What is your name?

A. Harold L. Swartz.

Trial Examiner Myers: Will you please spell your name?

A. S-w-a-r-t-z.

Trial Examiner Myers: Where do you live?

A. 4525 Lindell Avenue.

Trial Examiner Myers: St. Louis?

A. Yes, sir.

Trial Examiner Myers: You may proceed, Mr. Tucker.

By Mr. Tucker:

Q. Mr. Swartz, what is your occupation?

A. At this time I am superintendent of the work rooms at Scruggs-Vandervoort-Barney.

Q. That is a retail department store here in St. Louis?

A. Correct.

Q. And what work rooms are included under your supervision?

A. The ladies' alteration rooms, and the men's alterations, the dressmaking, the fur work room and fur storage, and the cleaning department.

Q. What has been your previous experience, briefly, in your line of work?

A. Well, for the past twenty years I have been in alteration rooms. I have been connected for seven years in San Francisco with Livingston Brothers, and ten years in Dallas, Texas, with Neiman Marcus Company.

Q. Have you also worked in other towns?

A. Yes, sir, for three years I made surveys in various stores throughout the country. Briefly, starting from Seattle, Washington, with Reeders & Nelson, branch of Marshall Field's, Best & Company, Seattle, Washington. In San Francisco, the following: the White House, H. Liebes & Company, and Hale Brothers, five stores, these being located in San Francisco, Oakland, Sacramento and San Jose.

[fol. 61] Q. Now, these stores you have mentioned, not only the last group but the others, some of those are department stores, are they?

A. And some are specialty shops.

Q. Some are women's specialty shops?

A. Yes, sir.

Q. And in the department stores, has your experience been both in the men and women's alteration departments?

A. Yes, sir.

Q. Or busheling room, which is the conventional term for men's departments.

A. That is right.

Q. How did you happen to come to St. Louis?

A. I was making a survey of stores, these various stores, for the last three years and due to the War and not being able to travel, when I got as far as St. Louis I made one survey of the men's alteration rooms at Famous-Barr while I had an appointment with Scruggs-Vandervoort. When I got there I made the survey of their ladies' alteration room, and men's alteration room and their fur work rooms. At that time I decided it would be wise for me to accept an offer they made me, so I stayed here.

Q. You were traveling around during these three years as an expert?

A. As a consultant, yes, sir.

Q. Consultant or specialist?

A. Of alteration departments.

Q. And busheling rooms?

A. I call them all alteration rooms.

Q. When you say that you include—I mean busheling rooms?

A. Yes, sir.

Q. You have had experience in design, also, have you?

A. That is correct.

Q. In your opinion, would a qualified tailor be able to do the work in a busheling room or in the women's alteration department just as well?

A. I use them for both.

Q. Is that the setup at Scruggs?

A. Yes, sir.

Q. You switch them back and forth as needed?

A. Yes, sir.

Q. And is that true also of the other classification of employees in these other alteration departments?

A. You see I believe the most progressive stores try to switch men, for they want the people to be trained in the various departments to take care of slack. One department may be slack and another busy and you would not want to lay people off and hire others when you have work by switching those to other work of the same skill.

[fol. 62] Q. If I understand you correctly, it lends itself to efficient operation?

A. Correct.

Q. And a more uniform measure of keeping busy all of the time, to be able to switch them?

A. That is correct.

Q. Does that also apply to the fur alteration room?

A. Yes. I transfer people from that alteration room to the fur work room.

Q. And from the fur work room to the men's or women's alteration rooms?

A. That is right.

Q. And you say they are able to do the work satisfactorily?

A. I do.

Q. And do you transfer any or all of these employees in any one department to another department?

A. Never all at one time, no, sir.

Q. Would you transfer any one employee doing one type of work just as readily as you would another?

A. I would not say that. You always have your variation of skill and ability. It is a question of personal ability there. I would not say all people are alike, no, sir.

Q. What I mean to say is, if you happen to be extra busy in one of the departments and not so busy in another department and needed a particular type of operation from one department, would you take any one classification of employee as readily as another, depending upon what you needed?

A. Depending upon what was needed, exactly.

Q. In other words, if I understand you correctly, any one group of employees in any of your three alteration rooms you have spoken of could just as well go into any one of the other alteration rooms and do that same class of work?

A. That is right.

Q. And do you have both men and women employees in each of these three departments?

A. Yes, I do.

Q. And you transfer both the men and women in the same way, from one department to the other?

A. That is right.

Q. Now, you are here under subpoena, are you not?

A. Yes, sir.

Q. Is the act of skill required to do one of these classes of work in one of the work rooms mentioned as great as it is in one of the other work rooms?

A. You mean one kind of skill?

[fol. 63] Q. Yes, for the operator to go into one of the other rooms?

A. I would say that is identical.

Mr. Tucker: That is all.

Trial Examiner Myers: Are there any questions?

Cross-examination.

By Mr. Harris:

Q. How long have you been at Scruggs?

A. About a year.

Q. Commonly referred to as Vandervoorts?

A. That is right.

Q. That is the name of the store to you?

A. True.

Q. Are you a tailor by profession?

A. Yes.

Q. What about your experience in actual tailoring work?

A. I will have to go way back in history, stop me if I am going too far.

Q. Go as far as you like.

A. At the age of about seventeen or eighteen I sewed three years in a large ladies' clothing factory to get designing, it was felt necessary if I studied designing, which I desired to do, that I would have to learn how to sew. I spent three years in this at the H. Black Company, in Cleveland, Ohio.

Q. What were you sewing on?

A. Women's garments, suits and coats, and we made some dresses.

Q. All right.

A. Then I went to New York and took up drafting of patterns and also the New York School of Fine Applied Arts, where we took lines, color, and so on, also to the Platt Company in Brooklyn, New York, where we took a history of costume,—I don't know if that is what you want to know.

Q. Go ahead.

A. Then I went with the Princz Beiderman Company, in Cleveland.

Mr. Tucker: What do they do?

A. Manufacture women's clothing.

Q. I want—I don't want to break in, but in what capacity?

[fol. 64] A. In a designing capacity, also in fantastic management. I am a member of the Taylor Society of Industrial Engineers.

Mr. Harris: What is that?

A. I don't know whether you are familiar with the Taylor Method or not, we are getting into deep stuff, he does his finest work in steel, the name happens to be similar.

Q. It is spelled T-a-y-l-o-r?

A. Yes, sir.

Q. In the United States Steel Company?

A. I think he was in the United States Steel.

Q. I thought you referred to tailor.

A. No, it was similar.

Q. All right, proceed.

A. Then I went with Halley Brothers in Cleveland, who are a large department store, and organized systems and methods in their Alteration Department in ladies and men's and fur work.

Q. Does that substantially cover it?

A. That is where I really started out doing things I have actually ended up doing again.

Mr. Tucker: Does that bring you up to where you gave your previous qualifications?

A. Not yet, then I went from Halley Brothers——

Trial Examiner Myers: How long were you with Halley Brothers?

A. A year, and seven years in San Francisco and ten years in Dallas. Now, you are up to date.

By Mr. Harris:

Q. All right, have you done any work as a tailor except those first three years you worked in that factory?

A. I have sewed once in a while when I wanted to do something, I have not made my living as a tailor.

Q. Or actually done any work with your hands?

A. I cut a lot of patterns all the time, I do now.

Q. Except for pattern work?

A. No, I don't earn my living sewing.

Q. Do tailors ordinarily cut patterns?

A. No, they do not ordinarily, that is not designing.

[fol. 65] Q. That is not designing, a tailor is another fellow?

A. He does the needle work.

Q. That is a well recognized trade, isn't it?

A. That is right.

Q. And at Vandervoort's do you shift any people who work on women's dresses into men's coats?

A. Yes, sir.

Q. You have people working on women's dresses?

A. Yes, sir.

Q. Making alterations?

A. Yes sir.

Q. And also working on men's coats?

A. Yes, sir.

Q. Do you know whether that is done at Famous-Barr?

A. I made that survey but I would not want to say. I don't know whether they have shifted. I was only there a few days to make a survey and would not want to speak for that.

Q. Were you at Vandervoorts in February, 1942?

A. No, sir.

Q. Do you know if the International Ladies Garment Union made an effort to organize the alteration department?

A. I was never interested in unions, had nothing to do with it.

Q. I asked if you knew if they made an effort to organize it?

A. I don't know.

Q. Do you know whether any other organization made an effort to organize the Alteration Department?

A. No, I don't.

Q. You are in charge of all types of work rooms?

A. Not all types, no, just those I mentioned.

Q. Ladies' and men's alterations, furs, fur storage, cleaning and dressmaking?

A. That is right.

Q. What is the dressmaking?

A. Just what it implies.

Q. You make new dresses and sell them?

A. Yes, sir.

Q. You put those other people who make dresses in the alteration department?

A. Yes, sir.

Q. What do they do in the dressmaking department?

A. They do alterations in the alteration room, when working there, and dressmaking in the dressmaking department.

Q. Men or women?

A. Women, we have men, too.

Q. Men dressmakers, too?

A. Yes, sir.

Q. Do they work on altering men's coats and suits?

[fol. 66] A. I have not had occasion to use them, you mean on men's or women's?

Q. Either one.

A. I have used them on women's but I have not had occasion so far as to use them but would not hesitate to do so.

Q. You have used women dressmakers on women's alterations?

A. Yes, sir.

Q. Dress or coat alterations?

A. Coat alterations.

Q. Is it true that ordinarily a dressmaker, unless he or she has had experience, would not qualify to work on alterations?

A. Would not qualify?

Q. Unless he has had particular experience?

Trial Examiner Myers: Reframe your question.

By Mr. Harris:

Q. Is it true that ordinarily a person who alters women's dresses is not, I don't mean but would not be qualified, but is not qualified, I mean is not qualified to alter men's suits?

A. I would not say that, no.

Q. Is it your theory they ought to be shifted around so they will get experience in all types of alterations?

A. Yes, sir.

Q. That is what you are attempting to do at Vandervoorts?

A. That is what I do any place in the country.

Q. You say that in the more progressive stores that is what they do?

A. That is correct.

Q. That has not always been the custom in the past?

A. It depends on the store you are talking about, I don't think you could lay it to a certain definite custom.

Q. What has it been?

A. It depends on the outlook of the organization and the kind of management they have.

Q. Your idea of shifting is to give experience in all types of operation?

A. Yes, sir.

Q. If not shifted they don't have the experience in all types of operations?

A. If you have not done anything I don't suppose you can say you are experienced. I would compare it to running one type of a screw machine and if changed to another machine you might not be as experienced, but there is a similar, a definite and close relation.

[fol. 67] Q. Do you know whether in most department stores there has not been this shifting around as you are doing at Vandervoorts?

A. They do it in some stores, some they don't. I don't know the percentage of each.

Mr. Harris: That is all.

Mr. Wilson: I have no questions.

Mr. Tucker: I have a few more questions.

Redirect examination.

By Mr. Tucker:

Q. Do I understand you would not hesitate to send a dressmaker into the men's busheling room to work there if you felt it was needed?

A. That is true.

Q. You feel that would be a qualification necessary?

A. That is right.

Q. And while it might be different in the various stores, due to the fact they are not as freely interchanged from one department to the other, that the basic skills are such in any store as to permit the transfer of employees from the fur or alteration to the women's alteration?

A. That is correct.

Q. To the men's bushcling room and back again?

A. That is right.

Q. Now then, do you, yourself, instruct the employees in these various classifications or show them how to do things?

A. Occasionally, I don't have time to instruct all the people.

Q. You feel qualified to do that?

A. Yes, sir.

Q. Are these various types of operations and the different rooms under your supervision?

A. That is right.

Q. You have on occasions shown people how to do things?

A. Oh, yes, very often.

Q. Do you consider the most efficient operation in the department store to correlate the men's and women's alteration and the fur work room and the dressmaking room in the same manner you have done it in Scruggs?

A. I do.

Q. And interchange employees?

A. I do.

[fol. 68] Q. As you have testified you do at Scruggs?

A. Yes, sir.

Mr. Tucker: That is all.

Trial Examiner Myers: Are there any more questions?

Mr. Harris: I have one or two more.

Recross-examination.

By Mr. Harris:

Q. Did you say you made a survey at Famous-Barr of the alteration room?

A. That is right.

Q. What was the purpose of the survey?

A. To improve the operation.

Q. Did you make any recommendations?

A. Yes, sir.

Q. Did your recommendations include shifting of employees?

A. The survey did not cover that.

Q. You did not go into that question at all?

A. That was not the vital thing, it was something entirely different, machinery setup, system and so on. I may have recommended, of course I don't remember whether I did or not. That was a minor detail at that time.

Mr. Harris: That is all.

Mr. Tucker: The survey at the Famous-Barr was only in the men's busheling?

The Witness: That is right, I did not have anything to do with the ladies' alteration or fur work.

Mr. Harris: You were not employed to make a survey of all the alteration rooms at Famous-Barr?

A. No, sir.

Q. You were merely employed to make a survey of the busheling room?

A. That is right.

Q. Does that include the basement?

A. No, just the second floor.

Mr. Harris: That is all.

Trial Examiner Myers: Have you any questions, Mr. Wilson?

Mr. Wilson: No, sir.

Mr. Tucker: That is all.

Trial Examiner Myers: You are excused.

* * * * * * * *

[fol. 69] Mr. Tucker: With reference to the testimony of the witness Scherer yesterday, that his impression was that there had been a contract to which the Famous-Barr was a party, which ended some time in 1919 or 1920, for which the Famous-Barr Company contracted for its busheimen with the union known as Local 11 of the Journeymen Tailors, it may be stipulated that the contract so referred to by the witness was a contract between the Union mentioned and an employers' group, the name of which I don't know and which is immaterial, but the group included the following stores: Famous Barr & Company, involved here; Stix, Baer & Fuller, a St. Louis department

store; Boyd's, a specialty shop, handling men's clothing only at that time; Browning, King & Company, men's clothing store that is now out of existence; Nugents, a department store no longer in existence; Wolff Clothing Company, which at that time handled only men's clothing; Weil Clothing Company, which at that time handled only men's clothing; Schmitz & Schroeder, at that time handling only men's clothing and is no longer in existence; Greenfields, which at that time handled only men's clothing, and Werner & Werner, no longer in existence, but which at the time of the contract handled only men's clothing; that there were not separate contracts with these ten different employers but one contract between the employers listed as a group and this Local Union 11.

It is further stipulated that the Petitioning Union has offered to produce a witness, who is ill and would testify except for the fact he is ill, that this contract was in effect for a period of approximately ten years, ending in 1919 or 1920. It is so stipulated by the Company.

Mr. Harris: The Petitioning Union agrees to the stipulation.

Trial Examiner Myers: Do you, Mr. Wilson?

Mr. Wilson: I will so stipulate.

* * * * * * *

[fol. 70] Trial Examiner Myers: It is hereby stipulated and agreed:

(1) That the United Retail, Wholesale and Department Store Employees of America, (CIO) has contract with a number of department stores throughout the United States:

(2) That some of the said contracts include employees in the busheling department of the said department stores in the same industrial unit with other selling and non-selling employees;

(3) That some of the said contracts exclude employees in the busheling department of said department stores from a unit composed of the other selling and non-selling employees but in no case were the busheling department employees excluded from the unit fixed in the said contract for the purpose of establishing a busheling department employees as a separate unit to be represented by the said United Retail, Wholesale and Department Store Employees

of America (CIO), except that the Petitioner herein believes that it has now or has had separate contracts for collective bargaining in busheling departments of various department stores and agreed to furnish evidence of such contracts in a letter to be sent to the Board not later than May 14, 1943, a copy thereof to be sent simultaneously to counsel for the parties herein.

(4) That in all cases where a union other than the said United Retail, Wholesale and Department Store Employees of America (CIO) represents the employees of the busheling department for purposes of collective bargaining in any department store with which the said United Retail, Wholesale and Department Store Employees of America (CIO) has collective bargaining contracts, such other union had organized the employees of such busheling departments represented by such other union prior to the organization of the other selling and non selling employees in the store by said United Retail, Wholesale and Department Store Employees of America (CIO).

It is so stipulated, Mr. Tucker.

Mr. Tucker: Yes, sir.

[fol. 71] Trial Examiner Myers: Is it so stipulated, Mr. Harris?

Mr. Harris: Yes, sir. I am stipulating to the facts as you read them for the purpose of this proceeding here.

Trial Examiner Myers: Is that agreeable to you, Mr. Tucker?

Mr. Tucker: Yes, sir.

Trial Examiner Myers: And to you, Mr. Wilson?

Mr. Wilson: It is agreeable with me and I stipulate it is agreeable to me, and the stipulation is agreeable to me.

Trial Examiner Myers: All right.

Mr. Tucker: On account of that date, I would like to ask if this is not the understanding, that unless the Petitioning Union submits evidence prior to May 14, on or before May 14, 1943, of the cases where the CIO Department Store Union——

Mr. Harris: You mean unless the letter is sent as provided in the stipulation?

Mr. Tucker: Yes, unless the letter is sent by the Petitioner on or before May 14, 1943, as provided in the stipulation, that there shall be no basis for any assumption

that the CIO Department Store Union does represent any bushelmen department in any department stores as separate units. That is the purpose of the stipulation.

Mr. Harris: That is my understanding.

Mr. Tucker: Is that yours, Mr. Wilson?

Mr. Wilson: That is my understanding.

Mr. Tucker: That is mine also.

. . . . . .

[fol. 72] GRIFFIN MCCARTHY, a witness called by and on behalf of the Company, being first duly sworn, was examined and testified as follows:

Direct examination.

Trial Examiner Myers: What is your name?

A. Griffin McCarthy.

Trial Examiner Myers: Where do you live?

A. 23 Windemere Place, St. Louis, Mo.

Trial Examiner Myers: You may be seated, sir.

By Mr. Tucker:

Q. Now, Mr. McCarthy—Mr. Examiner, before we go on with Mr. McCarthy's testimony, there was some discussion in view of Mr. Weber's testimony whether he should be excluded or included in the unit. The question was asked—the Company was asked to define its position, and its position is Mr. Weber, who was foreman of this department, should be excluded from the unit as claimed. I understand it is immaterial to the Petitioning Union whether it is included or excluded, and they are agreeable to amending the petition to the extent of excluding also the foreman of the basement busheling department, or No. 281, as well as the foreman of the first and second floor busheling department, No. 280. Is that correct?

Mr. Harris: The foreman of Department 280 certainly ought to be excluded. I will not say we are agreeable to excluding Mr. Weber. We are not taking any position on it and do not care whether he is included or excluded.

Mr. Tucker: It is satisfactory to me to have that position in the record.

Trial Examiner Myers: Off the record.

(Discussion off the record.)

Trial Examiner Myers: On the record.

Mr. Tucker: I want to offer in evidence, although it may not be strictly necessary, the brief of the Petitioning Union in Case 505. I will not offer that in evidence if it is [fol. 73] thoroughly understood that the brief, as I believe I did make clear this morning, and all other papers in the previous case are in evidence. Is that understood?

Mr. Harris: That is my understanding, yes, sir.

Trial Examiner Myers: They are not in evidence.

Mr. Harris: They may be referred to.

Mr. Tucker: Then I had better have it marked and put it in evidence.

(Thereupon the document above referred to was marked as Company's Exhibit No. 1 for identification.)

Mr. Tucker: Now, I offer it in evidence.

Mr. Harris: I have no objection.

Trial Examiner Myers: There being no objection, I will ask the Reporter to mark this document in evidence as Company's Exhibit No. 1.

(The document heretofore marked Company's Exhibit No. 1 for identification was received in evidence.)

By Mr. Tucker:

Q. Mr. McCarthy, there was testimony here the other day, which you heard, about the reduction of the number of employees in the busheling department in September. Could you state whether or not that reduction was caused by a reduction in business?

A. It was.

Q. And was the reduction in business in proportion to the reduction in the number of employees in the busheling departments?

A. Yes, sir, it was.

Trial Examiner Myers: What day was that on?

A. Approximately the first week in September, from the 3rd to about the 9th or 10th. Or the date during which time the people were taken out of the busheling department. In 1942, of course.

By Mr. Tucker:

Q. You heard the testimony of Mr. Verderber to the effect that everyone in the busheling department received raises

on two occasions that he referred to in his testimony. Is that correct?

A. That is not correct.

Q. Have you prepared at my request a statement showing the transaction that takes place in the department [fol. 74] involved in connection with the sale of a suit of clothes as a typical transaction in the men's clothing department?

A. I have.

Q. Get that out, please. In order to shorten the record I had this prepared, and propose to offer it as an exhibit rather than have Mr. McCarthy testify about it. If Mr. Harris would like to cross examine about it he can do that, but it will save our going through the whole business in the transcript.

Trial Examiner Myers: Is that agreeable to you, Mr. Harris?

Mr. Harris: That is perfectly agreeable with me.

Trial Examiner Myers: All right. The document may be marked.

(Whereupon the document above referred to was marked as Company's Exhibit No. 2 for identification.)

Mr. Tucker: I offer it in evidence.

Trial Examiner Myers: All right. Will the Reporter please mark the statement in evidence as Company's Exhibit No. 2?

(The document heretofore marked Company's Exhibit No. 2 for identification was received in evidence.)

By Mr. Tucker:

Q. Do you know how many employees in the busheling department were given raises in June, 1941?

A. Of those who are presently in our employ—I have that here.

Trial Examiner Myers: I mean approximately at that time given raises.

A. I can't answer on that particular time, but I can answer as to how many of those persons who were in our employ at that time are still in our employ did not receive raises then. The turnover in that department has been relatively small, and I think the answer I can give will be substantially correct.

Trial Examiner Myers: Will you give the answer as to March, 1942? Could you give it better in percentages?

A. I can give it in actual number.

[fol. 75] Trial Examiner Myers: Then you would have to give the number of employees.

A. There are six employees who were employed in 1941 and are still in our employ at this time who did not receive increases in June, 1941.

Trial Examiner Myers: Do you know how many were employed in the busheling department at that time approximately?

A. There were approximately thirty-five employees, between thirty and thirty-five employees.

Trial Examiner Myers: How about March, 1942?

A. In March, 1942, all of the employees in the busheling room received increases.

By Mr. Tucker:

Q. Did they all receive the same percentage of increase?

A. No.

Q. Did they all receive the same flat amount of increase?

A. No.

Q. Did they all receive an increase in accordance with any request for any special increase which they made, any specific increase?

A. No.

Q. What is the salary range in the men's busheling room?

A. The lowest salary is $20.00 a week, and, excluding the foreman, the highest salary is $40.00 a week.

Q. And what is the salary range in the women's alteration department?

A. The lowest salary is $17.00 a week, and the highest salary is $40.00 a week.

Q. And do you know the range in the fur alterations department?

A. It is approximately the same, except that the top salary in the fur operations department is more than $40.00 a week. My recollection is that the fur—we have a combination man, a man who knows two trades really. He is a fur cutter and nailer, and gets either $45.00 or $46.00 a week.

Q. What is the salary range in the store otherwise for the non-supervisory employees?

A. Of course, that covers a very wide range of employees and job classifications. It would be correct to say that for [fol. 76] full time employees it ranges from $16.00 a week to approximately $70.00 or $75.00 a week.

Q. That includes commissions in cases where they sell on commission?

A. Particularly in the latter case, it includes people who sell on a commission basis.

Q. What is the salary range of employees in the men's clothing department on the second floor?

A. I will have to refer you—I will have to ask you to clarify that question, Mr. Tucker, because the men on the second floor in the men's clothing department do not work on a salary basis. They have drawing accounts which are paid to them against earnings or straight commission.

Q. What is the highest and what is the lowest compensation received by men in the men's clothing store on the second floor?

A. With reference to compensation, it would run from $25.00 a week to somewhere in the vicinity of $70.00 or $75.00 a week.

Q. Do you know of cases of interchange of employees where people have been transferred from the men's busheling room to the women's busheling room to work, or vice versa?

A. Yes, sir.

Q. Do you know of any department where skills comparable to those in the men's busheling room are involved that are not in the unit involved in the Petitioning Union?

A. Yes.

Q. What departments are they?

A. In the women's alteration department and the fur alteration department.

Mr. Tucker: Is it clear that our Exhibit No. 2 has been offered and received in evidence?

Trial Examiner Myers: That is right.

By Mr. Tucker:

Q. Is the Company's labor policy the same for employees in busheling departments Nos. 280 and 281 as it is in other departments of the store?

A. Exactly the same in every way.

Q. And is there a single personnel director for the entire store?

A. Yes.

[fol. 77] Q. The same personnel director for the busheling departments as for the others?

A. Yes.

Q. Are your regulations with reference to employment, transfer, promotion, salary, increases, layoffs, discharges, discipline, leave of absence, vacations, admission to the building payroll computations, sick leave, pay, advances in salary, advances on salaries, discounts, and rules for the guidance of employees and for the year-end bonus the same or different from the employees of the busheling department as for others in the store?

A. Identical in every respect.

Q. Is that same thing true with reference to various privileges that are accorded the employees in the store?

A. Yes, sir.

Q. And the same thing is true as to group life insurance, group hospital insurance, welfare membership, sick leave, pay, charge accounts, employee's discounts, rest rooms, toilet rooms, locker rooms, lunch rooms, hospital, library, and things of that kind?

A. Exactly the same.

Q. What is the policy or practice with reference to charges for alterations in the men's busheling departments?

A. With the very infrequent exceptions that were referred to in previous testimony, which relate only to the basement men's clothing department, there is no charge for alterations.

Q. You make charges for alterations in Department 280, the second floor busheling room, under any condition?

A. No.

Q. Do you do any alterations for outside garments not purchased in the store?

A. If we have ever done them it is so infrequently and such an unusual circumstance it has never come to my attention.

Q. Then is it correct to state that the busheling department is maintained for the purpose of fitting clothes that you sell there in the store at the time of sale?

A. That is its purpose.

Q. So far as you know, that is the only way it operates?

A. I know that is the only way it operates.

[fol. 78] Q. The record does not show and I think perhaps it should what your capacity is in the store, what your title is, and how long you have been there. Will you state that for the record, please?

A. I am superintendent of employment, and have held that position for approximately twenty years, and have been employed at the store since October 1, 1919.

Q. How many employees are there approximately in Departments Nos. 255 and 256, which are the women's alteration departments?

A. Between sixty-five and seventy at this time.

Q. And is it your opinion that they have equal skill to those in the men's busheling rooms?

A. Yes.

Q. You say "at this time". Is that the normal complement of those departments?

A. I am not able to recall, Mr. Examiner, whether we are carrying any extra employees in that department at this time or not, and that is why I answered with a range of five, because I am not quite certain. We are past our Easter season now, and my opinion is we have few if any extra employees in the department now.

Q. How many employees in the fur alteration work room?

A. Ten to twelve. And the qualification is due to pretty much the same reason. I am certain about extra employees.

Q. The qualification in your answer——

A. As to ten to twelve.

Q. And you judge their skill would be comparable to those in the men's busheling and women's alteration department?

Mr. Harris: I object to that unless the witness is qualified.

Trial Examiner Myers: He hired them. I overrule the objection.

The Witness: Would you read the question, please?

(Question read by the Reporter.)

The Witness: Yes, they are.

[fol. 79] Trial Examiner Myers: Did you hire these people?

A. Yes, sir.

Trial Examiner Myers: I just assumed it.

Mr. Tucker: That is all.

Trial Examiner Myers: Any questions?

Mr. Harris: Yes.

Cross-examination.

By Mr. Harris:

Q. You heard Mr. Verderber testify here about the two increases in June, 1941, and March, 1942?

A. Yes.

Q. And in March, 1942, everybody did receive an increase in the bushelmen's department?

A. That is correct.

Q. But it wasn't the same percentage or the same amount?

A. That is correct.

Q. How about in June, 1941? How many received increases?

A. I said there were six people now working in the departments who were working at that time, and who did not receive an increase at that time. I have not compared the payroll for June, 1941, and therefore do not know how many people were in the department then.

Q. I wasn't quite clear on that. Your estimate was there were thirty to thirty-five at that time?

A. That is right.

Q. And by that you assume there were some twenty-five or twenty-nine received increases in June, 1941?

A. No, because some of the people who were not working in the department now may not have received increases at that time.

Q. What would be your estimate as to how many did receive increases in 1941?

A. There were six or more who did not receive increases.

Q. What is your estimate of how many did receive an increase in June, 1941?

A. By the opposite calculation, it would be twenty-nine or less who received increases.

Trial Examiner Myers: Would you say about seventy-five per cent received them?

A. Yes, that is a pretty close guess.

[fol. 80] By Mr. Harris:

Q. That would be a fair estimate?

A. That would be a fair estimate.

Q. All right. What transfers have there been from the busheling room to other departments except those Mr. Vanderber testified about?

A. Offhand I cannot recall. We do not have any index of our transfer. I can recall some cases where people have been transferred to the busheling room from the ladies' alteration room. I cannot remember——

Q. Were those permanent transfers?

A. Yes. I cannot remember offhand whether there have been any transfers out of the busheling room into the ladies' alteration room. There has of course been one transfer from the busheling room on the 2nd floor to the busheling room in the basement—that is included in the list Mr. Vanderber referred to in his testimony. I cannot recall any.

Q. Except those Mr. Vanderber referred to, you do not recall any transfers?

A. From the men's busheling room in to the women's alteration room, I do not recall any.

Q. Do you recall at least one from the women's alteration room into the men's busheling department?

A. I recall more than one of those.

Q. How many do you recall?

A. Three or four.

Q. Those were permanent transfers?

A. Those were permanent transfers.

Trial Examiner Myers: Over what period of time?

A. Let's see. I think the earliest one in point of time was about six or seven years ago. I have to depend upon my memory to try and locate the facts about the transfers and that is the farthest one back in point of time I can recall.

Trial Examiner Myers: What is the latest one?

A. There is one woman working in the busheling room now who previously worked in the women's alteration department.

Trial Examiner Myers: When was she transferred?

A. From the women's alteration department?

Trial Examiner Myers: Yes.

A. Well, in 1938 or 1939. I think I have a note of that [fol. 81] somewhere. Well, I guess not. I thought I had it, but I haven't. It was in 1938 or 1939, the way I recall it. She had previously been a tailoress in the women's alteration department, and she was transferred into the busheling room.

Q. When you speak of comparable skill of the employees in the women's alteration department and the busheling room, what do you mean, Mr. McCarthy?

A. I am referring to comparable tailoring operations, sewing operations.

Q. You mean on women's coats and men's coats?

A. Women's coats and men's coats, and on women's skirts and men's trousers. The only thing you cannot compare is vests, because women's suits do not generally have vests.

Q. And you cannot compare women's dresses to any article of men's clothing?

A. No, but of course there are comparable skills.

Q. When you refer to comparable skills——

A. I was referring to operations. I understood that was the question. There are operations that are exactly comparable. There are skills that are equivalent.

Q. I was trying to find out what you meant by your statement when you referred to comparable skills—I think that is the terminology used—just what you meant.

A. For example, the alteration of a collar is just as difficult a job technically on a woman's suit coat as it is on a man's suit coat. Both those operations are carried on in either department.

Q. Yes. That is the substance of Mr. Weber's testimony.

A. Yes, that is right.

Q. And did you mean substantially the same thing by comparable skills as he testified to?

A. Yes, and I also meant it, if my testimony was ambiguous—there are skills of women who work on gowns, there are degrees of skill just as high and perhaps I should say just as difficult to attain as any skill that the tailors have or the tailoresses have when they work on suits and on coats.

Q. Yes, just as difficult to attain but a different kind of skill, is that what you meant?

A. That is correct.

Q. Now, there was a long question Mr. Tucker asked you about the same labor policy throughout the store, of one [fol. 82] personnel director, the same discipline, leave of absence, insurance, discounts and so on. Does that apply to the Spring Avenue Warehouse also?

A. Yes, sir.

Q. It is exactly the same out there as it is in any other part of the store or the system?

A. That is correct.

Q. In all those things he asked you about?

A. That is right.

Q. And your labor policy is the same regarding the teamsters, carpenters, electricians, and any other groups with whom you have contracts at the present time?

A. That is correct.

Q. Will you refer, please, to Exhibit No. 2? As I understand, it is your statement you would make and this is being introduced in order to avoid your reading or telling the same story.

A. That is right.

Q. And you prepared this statement?

A. That is right.

Q. Refer to Page 4, please, at the top of the second paragraph.

Trial Examiner Myers: What paragraph is that? The next to the last paragraph of the statement?

A. Yes, sir.

Mr. Harris: Is the first paragraph on Page 4.

Trial Examiner Myers: If this record is ever printed——

Mr. Harris: It is the next to the last paragraph of the statement. It says:

> "When the alterations of the suits are completed and have been approved by the Examiner, the suit is sent to the storage bin."

Is the examiner an employee of the busheling department?

A. Yes.

Q. This storage bin, or wrapping desk, is that connected with the "Will Call" department?

A. No, the "Will Call" department occupies a space at the east end of the wrapping desk where the "Will call" clerk and cashier keep their files and money [drawer]. It is convenient to and adjacent to the wrapping desk, but is a different department from the other employees who work in the wrapping desk.

Q. Where is this storage bin and wrapping desk with reference to location?

A. On the Locust Street side.

Q. On the 2nd floor or 2nd floor balcony?

A. Second floor.

[fol. 83] Q. It is not on the balcony with the alteration department?

A. No.

Q. After the suit has reached the "Will Call" department, it never goes back to the—I mean after it has reached the wrapping desk or the "Will Call" department, either one, it never goes back to the alteration department or busheling room unless there is some correction to be made in the alteration?

A. That is correct.

Mr. Harris: I think that is all.

Mr. Tucker: I have a question or two.

Redirect examination.

By Mr. Tucker:

Q. Did I understand you correctly there were some other transfers made in and out of the men's busheling room, between the men's busheling room and the ladies' alteration department or the fur work room other than those testified to by Mr. Verderber?

A. That is correct. I said I could remember somewhere transfers were made between the women's alteration room and the busheling room, and offhand I do not recall any made in the opposite direction.

Q. You know that they were made, but do not recall the names of the people?

A. Correct.

Q. Have you hired people on various occasions for work in one of these departments?

A. Yes, sir.

Q. Say the men's busheling room, whose only previous experience has been in women's alterations?

A. Yes.

Q. And have you hired men or women in the women's alteration whose only previous experience has been in busheling work?

A. Yes.

Q. And the answer to the previous question was both men and women, I assume?

A. The answer to the question about hiring people with women's alteration experience in the men's busheling room?

Q. Yes.

A. Yes, we have hired both men and women in the men's busheling room whose only previous experience had been in women's alterations.

Mr. Tucker: That is all.

[fol. 84] Recross-examination.

By Mr. Harris:

Q. Ordinarily you would try to get men for the men's busheling room who had had experience in other busheling rooms, would you not?

A. It would be a natural thing to do, but we have never made any particular point of avoiding the employment of a person with previous experience in the women's alteration room, or vice-versa.

Q. The same would be true in women's alterations, of course?

A. Yes, I say or vice versa.

Mr. Harris: That is all.

Mr. Tucker: That is all.

(Witness excused.)

Mr. Hackler: At this time I want to make a statement on the record about the card attached to the Regional Director's statement of claim, concerning representation. The card on that statement, which is Board's Exhibit No. 8, is identical with the cards which I have since checked with the exception that on the right-hand side where the address of the United Department Store Employees Union on the card submitted to us is 105 Commercial Building, rather than Suite 924 Central National Bank Building. Otherwise the cards are identically the same.

Trial Examiner Myers: Is that change agreeable?

Mr. Tucker: Yes, sir. I thought it was made before, but there is no objection.

Mr. Tucker: There is one further statement Mr. McCarthy wanted to put in the record, and he can be sworn or he can make it here, and that is as to the number of people in the women's alteration department who work on gowns.

Trial Examiner Myers: All right. He may make the statement.

[fol. 85] Mr. McCarthy: There are approximately twenty of the employees in the women's alterations department who are experienced gown hands. The remainder of the people in the women's alterations department are experienced and qualified to work on tailored garments.

Trial Examiner Myers: And those twenty are included in your statement of sixty-five or seventy employees?

Mr. McCarthy: That is correct.

Mr. Tucker: At this time I would like to make a formal motion to dismiss the petition.

Trial Examiner Myers: I cannot rule on that, Mr. Tucker, and I will submit that to the Board for its consideration.

* * * * * * *

BOARD'S EXHIBIT 3

Statement of Regional Director Concerning Claims of Authorization for the Purpose of Representation

UNITED STATES OF AMERICA

Before the National Labor Relations Board
Fourteenth Region

Case No. 14-R-588

In the Matter of MAY DEPARTMENT STORES COMPANY d/b.as Famous-Barr Company and ST. LOUIS JOINT COUNCIL, UNITED RETAIL, WHOLESALE AND DEPARTMENT STORE EMPLOYEES OF AMERICA (CIO)

The undersigned, Regional Director for the National Labor Relations Board, Fourteenth Region, has investigated the petition filed in the above-entitled case.
[fol. 86] In connection with the investigation, petitioner has submitted to me certain evidence in support of its allegation that petitioner represents 29 employees in the alleged appropriate unit. This evidence consisted of:

25 designations in the following form:

Application for Membership

United Department Store Employees Union

Affiliated with

The United Retail, Wholesale and Department Store Employees of America, C. I. O.

Suite 924 Central National Bank Bldg. 705 Olive St.
CHestnut 7157-9548

I, the undersigned, hereby request and accept membership in the United Department Store Employees

Union and do hereby appoint and authorize the officers thereof, to represent and negotiate for me in all matters pertaining to wages, hours and other conditions of employment.

Signed ..... Date .....
Address ..... Phone:
Employed at .....
Department .....
Length of Service with Firm .....
Comments .....

24 of the 25 signatures affixed to said designations appear to be genuine original signatures. One is printed. 23 of the 24 signatures which appear to be genuine original signatures are the names of persons whose names are on the Company's payroll of May 4, 1943, covering the alleged appropriate unit. The said payroll contains the names of 30 persons within the alleged appropriate unit.

The designations containing apparently genuine signatures and bearing the names of persons appearing upon the [fol. 87] Company's payroll were dated from September 29, 1942 to October 14, 1942.

Dated at St. Louis, Missouri, this 6th day of May, 1943.

Ross M. Madden, Regional Director, Fourteenth Region, National Labor Relations Board.

BOARD'S EXHIBIT 5

Date 5/7/43—Witness Verderber

(Received March 12, 1943, National Labor Relations Board)

March 11th, 1943.

Mr. F. Z. Salomon, General Manager, Famous Barr, 7th & Olive Streets, St. Louis, Missouri.

DEAR SIR:

This is to advise you that a majority of the employees in your busheling departments Number 280 and 281 have designated our organization as their collective bargaining agency.

I am writing you today requesting recognition of our organization and conferences looking to a collective bargaining agreement covering wages, hours and working conditions of these employees.

May I hear from you at your earli-st convenience?

Very truly yours, H. J. Gibbons, International Representative.

HJG:L.

[fols. 88-108] BOARD'S EXHIBIT 6

Date 5/7/43—Witness Verderber

(Received March 18, 1943 at 9 o'clock, Fourteenth Region, St. Louis, Mo.)

The May Department Stores Company, Famous-Barr Co. St. Louis, Mo.

March 13, 1943.

Mr. H. J. Gibmons, U. R., W. & D. S. E. of A., C. I. O., 705 Olive Street, St. Louis, Missouri.

DEAR SIR:

I am in receipt of your letter of March 11, 1943, requesting recoguition as bargaining agent for the employees of the busheling departments Numbers 280 and 281.

As you undoubtedly know, the situation is complicated not only by your previous representation proceedings before the Labor Board, but also by the pendency of unfair labor practice proceedings on which hearings will begin on March 22nd. We therefore deemed it necessary to submit the matter to our counsel for his advice, and will communicate with you as soon as possible.

Yours very truly, Famous-Barr Co., Fred Z. Salomon.

Intervener's Exhibit 5.

FAMOUS SAYINGS

Published by the Department Store Employees Union--Local 372--CIO

Room 205 Commercial Bldg. 214 North 6th. Street

Chestnut 7157---9548

VOL. 1. OCT. 23, 1942. NO. 60.

CIO ASKS BARGAINING CONFERENCE!

October 28, 1942

Famous-Barr Co.
St. Louis, Mo.

Attention: Morton May
Fred Z. Salomon

Gentlemen:

As you know, the employees of Famous-Barr have been engaged in forming and consolidating a CIO union. The purpose of this union is to establish and maintain an agency which will represent the employees in collective bargaining on the matters of earnings, hours and working conditions.

An overwhelming majority of Famous-Barr employees have joined the Department Store Employees Union, Local 372--CIO. Local 372 desires to be recognized as the official bargaining agency for Famous-Barr employees.

It is for the purpose of arranging a conference to discuss wages, hours and working conditions, as well as recognition of Local 372, that this letter is written.

May we expect your answer in the next few days.

Yours very truly,

Lance J. Utt

President, Local 372--CIO

This morning, the Famous-Barr Company will find the above letter [illegible]. The letter is self explanatory.

NAT'L LABOR RELATIONS BOARD EXHIBIT NO. 5 IN THE MATTER OF Famous Barr Co. CASE NO. 14-C-1 WITNESS DEL E. FISHER Official Reporter

forming and consolidating a CIO union. The purpose of this union is to establish and maintain an agency which will represent the employees in collective bargaining on the matters of earnings, hours and working conditions.

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May we expect your answer in the next few days.

Yours very truly,

Lance J. Utt

President, Local 372--CIO

This morning, the Famous-Barr Company will find the above letter on its desk. The letter is self-explanatory.

This action represents the desire of hundreds of CIO members in Famous-Barr for immediate action. Since Local 372 represents the vast majority of Famous employees, the Master Committee last night expressed the sentiment of the membership by deciding the time for action has arrived.

This letter is the last lap toward a CIO contract. It says good-bye to low earnings, the 6-day week, the tyrannical bosses, and the poor working conditions. We can now look forward to better earnings and better conditions.

Now is the time for increasing our organizational efforts. Those who are still on the fence should join immediately. The larger the membership, the better the contract. Join today!

CIO MADE JOIN LOCAL 372 TODAY! OVER

109-110

NATIONAL LABOR RELATIONS BOARD EXHIBIT NO. 5 IN THE MATTER OF WITNESS ETHEL E. FISHER OFFICIAL REPORTER BY

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Intervener's Exhibit 5.

CONTRACT DISCUSSION MEETINGS!

BE SURE YOUR DEPARTMENT IS RERESENTED!

Local 372 is opening negotiations on the contract which will cover wages, hours, and working conditions at Famous-Barr for the next year. As rapidly as possible we are putting into the contract the conditions under which you will work. It is therefore extremely important that you see that your department is present at your meeting.

5TH FLOOR
— TONIGHT! —
- AFTER WORK -
205 COMMERCIAL BUILDING

ALL
ST. CHARLES
EMPLOYEES
FRIDAY-OCT. 30.
RIGHT AFTER WORK

DAY PORTERS, MAIDS, MATRONS, MOPPERS, SCRUBWOMEN, SWEEPERS, WINDOW-WASHERS AND ELEVATOR OPERATORS
THURSDAY OCT. 29.
RIGHT AFTER WORK

LADIES' ALTERATION DEPT.
FRIDAY OCT. 30.
RIGHT AFTER WORK

The Ladies' Alteration women have many grievances.

What is more back breaking than bending over a sewing machine all day, or what is harder on the eyes than the close work you do?

-AFTER WORK-

205 COMMERCIAL BUILDING

LADIES' ALTERATION DEPT.
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DAY PORTERS, MAIDS, MATRONS, MOPPERS, SCRUBWOMEN, SWEEPERS, WINDOW-WASHERS AND ELEVATOR OPERATORS
THURSDAY OCT. 29.
RIGHT AFTER WORK

The Ladies' Alteration women have many grievances.

What is more back breaking than bending over a sewing machine all day, or what is harder on the eyes than the close work you do?

Yours is skilled work. One does not learn it overnight. You deserve much more than your present low pay.

We have received complaints about a "certain woman" who treats you with absolutely no respect. This must end.

Most of you are no longer young. You have put in many hard years at Famous-Barr. You deserve job security, to prevent your being replaced with younger women.

Some of you have taken the proper step to correct your grievances, by signing a CIO card.

What has the CIO to offer you.

We have a wage scale of $37.50 for your type of work in our contracts. We have seniority rights, which protect your jobs. We have grievance procedure, to see that you are treated decently on the job. Come to the meeting Friday, 205 Commercial Bldg, and talk this over.

111-124

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Intervener's Exhibit 9.

FAMOUS SAYINGS

Published by Local 372**CIO
Famous-Barr Unit of the United
Department Store Employees Union.

705 Olive St. Suite 924
Ch. 7157 ------ Ch. 9548

VOL 2 APR. 27 1943 NO 36



TAILORS ON THEIR WAY!

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

FOURTEENTH REGION

In the Matter of--

MAY DEPARTMENT STORES COMPANY
d/b/as FAMOUS-BARR COMPANY

and

LOCAL 372, UNITED RETAIL,
WHOLESALE AND DEPARTMENT
STORE EMPLOYEES OF AMERICA (CIO)
(Petitioner)

CASE No. 14--R--588

NOTICE OF HEARING

NATIONAL LABOR RELATIONS BOARD
CASE NO. 14-R-588 BOARD EXHIBIT NO. 9
RESPONDENT
IN THE MATTER OF
DATE 5/7 WITNESS Uzzelman
ETHEL E. FISHER, OFFICIAL REPORTER
BY

(Petitioner)

NOTICE OF HEARING

The Petitioner, above named, having heretofore filed with the National Labor Relations Board, Fourteenth Region, a Petition for Investigation and Certification of Representatives, pursuant to Section 9 (c) of the National Labor Relations Act, 49 Stat. 449, copy of which Petition is hereto attached, and it appearing to the National Labor Relations Board that a question affecting commerce has arisen concerning the representation of employees described by such Petition,

YOU ARE HEREBY NOTIFIED that pursuant to Section 9 (c) of the Act, on the 3rd day of May, 1943, at 10:00 a.m., Central War Time, in the National Labor Relations Board office, Room 1413 International Building, 722 Chestnut Street, St. Louis, Missouri.

OVER

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(continued from front)

a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board upon the question of representation affecting commerce which has arisen, at which time and place you will have the right to appear in person or otherwise, and give testimony.

IN WITNESS WHEREOF, The National Labor Relations Board has caused this, its Notice of Hearing to be signed by the Regional Director for the FOURTEENTH Region on this 22nd day of April, 1943.

/s/ Ross M. Madden
Regional Director

National Labor Relations Board

ELECTION FOR THE TAILORS!

Despite the legal language of the above notice of a hearing, its meaning is simple. Local 372 asked the Labor Board to hold an election among the employees in the busheling rooms on the second floor and in the basement (Departments #280 and #281).

The Labor Board is holding a hearing on this petition this coming Monday, May 3rd. Shortly after the hearing, we believe an election will be held and Local 372 will sit down with Famous-Barr and discuss wages, hours and working conditions for these two departments.

Local 372 would much rather petition for an election for the entire store. But due to the company's phoney story about 5500 employees, Local 372 must have a little more membership.

Since the busheling rooms have a 100% membership in Local 372, there is no problem. The solution to the company's fairy tale of 5500 employees is for Famous employees to join Local 372 immediately.

There can be an election among Famous-Barr employees if those who have not yet joined will sign an application card within the next few days. Then Local 372 can ask for an election for the store.

There can be an election among Famous-Barr employees if those who have not yet joined will sign an application card within the next few days. Then Local 372 can ask for an election for the store.

This is the time to go over the top. Certainly the trial has proven that Famous employees need not have any fear. They can discuss the union, sign up their fellow workers, hand out cards etc. Famous has done all the interfering it could in the past.

Today, there is nothing to fear. When a few more people sign up we can win an election and discuss earnings, hours and conditions for more than the busheling room. The tailors are close to improved conditions. You, too, can share in their bargaining with Famous-Barr.

****

You notice that the hearing on the tailor's petition is set for the same day that the trial reopens. We guess Famous-Barr will just have to hire more lawyers. There are two lawyers representing the company in the trial. They'll just have to hire two more. It would be a lot easier and cheaper to have a union, Mr. Famous-Barr!

Intervener's Exhibit 11.

FAMOUS SAYINGS

Published by Local 372-CIO;
United Department Store
Employees' Union

Suite 924...705 Olive St.
CH. 7157.....CH. 9548

VOL 2 · MAR 15 1943 · NO.21

NEW PLAN OF ACTION

Local 372-CIO has filed a petition for an election for all the tailors. This is the first of a series of election petitions for various groups of employees. Others will follow shortly.

When the National Labor Relations Board denied us the election recently, the Master Committee and the union representatives discussed our future course of action thoroughly. It was decided to make an appeal to all those who had not joined. Then as soon as possible, we intended to again petition for an election for everyone.

We made this appeal. Many new members came in. In normal times we would now be just about ready to petition again. But now, many members are going into the armed forces. Jobs are plentiful, and any of them pay better than the average Famous-Barr wage. We are gaining many new members, but we are also losing some.

WE HAVE NOT ABANDONED OUR PLAN TO PETITION FOR THE WHOLE STORE THE MOMENT WE GET ENOUGH CARDS. AGAIN WE SAY, YOU WHO HAVE NOT JOINED ARE KEEPING DOWN YOUR OWN WAGES, AND TE WAGES OF YOUR FELLOW EMPLOYEES.

We are now carefully studying Labor Board decisions to find which goraps of employees the Board would consider an appropriate bargaining unit. We find there are several, some in selling and others in non-selling departments.

Our plan is to organize these groups as nearly 100% as possible, just as we did the tailors. Then we will petition the Board for elections as rapidly as they are ready.

Our plan is to organize these groups as nearly 100% as possible, just as we did the tailors. Then we will petition the Board for elections as rapidly as they are ready.

Several groups have been pretty well organized for some time. It is not fair for these people to continue waiting indefinitely for other employees to make up their minds. So we are proceeding to get them the benefits of unionism as soon as possible.

Remember. This new plan in no way conflicts with our final goal of a 100% union store. We believe this new approach may do the job faster.

Every employee can help with both plans. Every card signed, and unit organized, brings us closer to the big election.

Your department alone may compose a bargaining unit. If other departments do the same work, then those departments together with yours may make a proper unit. Your unit may be well enough organized that an election could be held shortly. Come to the union office and discuss this with us.

By this new plan of action we are not dividing the employees into different local unions. Local 372 will remain the one union in the store. This is not a new procedure for our organization. Many department stores have been organized in just this way. We had hoped to have just one election at Famous-Barr. We came very close to succeeding. But now we resort to method of organizing section by section.

Let's get the job done rapidly. Don't depend upon someone else to do it. Sign up the people around you, and get ready for an election. If everyone will do his part, we can soon bring decent wages and working conditions for everyone. If you have not joined, why wait? Sign a card now. Bring your friends and come to the union office. The way to get action is to act.

133-134

NATIONAL LABOR RELATIONS BOARD
EXHIBIT NO. [illegible]
IN THE MATTER OF [illegible]
DATE 5/2 WITNESS [signature]
ETHEL E. FISHER, Official Reporter
BY [signature]

1663

YOU SHOULD ATTEND

Our new plan of action makes it absolutely necessary for everyone to keep in close contact with the union office.

As we prepare to file for elections, no notice will be published as to whom we plan to file for next. It is often necessary to withhold certain plans from Famous Sayings untilthey are complete, and we are ready to move on those plans.

Everything is discussed at the Master Committee meetings. As you know, every member is welcome to attend.

No army could ever win if it told the enemy in advance where it planned to strike next. It is the same way with our plans for elections.

We want the membership to keep fully informed in advance. Your department may be involved in an election we are planning. Or you may be able to help get in a few more members in a unit for which we are preparing to file.

So we urge every member to attend at least part of the Master Committee meetings. They are held every Monday right after work.

Those whose working hours do not permit them to attend the Master Committee meetings are urged to drop in the office at their very earliest convenience. We want every department to know what is being planned, and to help with the necessary work in preparing and winning elections.

The cooperation of every member will assure us of much more rapid results. So come in tonight.

THEY'LL BE BACK!

HYMIE SCHNEIDER, 5th Floor Shoes, worked at Famous for 3½ years. His record was tops. According to both Mr. Salomon and McCarthy, he was one of the best salesmen in the store.

The bosses thought he was about the swellest guy imaginable until he joined the CIO. Then in no time, they thought he was a bum.

One morning McCarthy called Hy to his office and offered him a raise of $5. That night he called him in again---and fired him, for union solicitation!

Imagine! In a space of five or six hours, Hy was promoted, then discharged!

He could hardly believe such a thing could happen. Surely, he thought, one of the store executives would recognize this gross injustice, and put him back to work.

He went to F. Z. Salomon. But Salomon said it was out of his jurisdiction and he could do nothing about it.

Hy went to Morton May: Mr. May told him to see Mr. Salomon! Hy went home jobless to his wife and two small children.

His case was immediately filed with the National Labor Relations Board. Next Monday Uncle Sam will begin his investigation of Famous-Barr's unjust treatment of Hy Schneider and a dozen others.

Hy is now doing his bit to lick the Axis, helping to build airplanes. He sends his very best regards to his friends in Local 372.

DOROTHY RASCIGLIONE, 7th Floor Housewares, put in seven years of loyal service at Famous-Barr.

The night Porters and Maids can't help but wonder about a certain would-be "Big Shot" who hangs around the store late at night.

As far as they can see, he does nothing when he is there, except stalk around and give them fishy stares as they go about their work.

Has he appointed himself a committee of one, to spy on the night crew?

If this gentleman has business at the store, all right. But if he has taken it upon himself to check up on their work, the night people wish to give notice that they don't need his "assistance."

Dorothy was loved by Famous as much as any member of the Famous Family, until she joined the CIO. Then she was treated like a stepchild.

McCarthy called her to his office on afternoon and read her the Famous Gestapo rule against asking people to join the union. Then he liquidated her.

Dorothy's case is one of the 13 which Uncle Sam is going to ask Famous bosses a lot of embarrassing questions about. Then her many friends at Famous-Barr will again see her cheerful smile, when she returns to her old job.

135-136

Intervener's Exhibit 12.

FAMOUS SAYINGS

Published by Local 372-CIO,
United Department Store
Employees' Union.

Suite 924....705 Olive Street.
CH. 7157.....CH. 9548

VOL. 2. MAR. 18, 1943. NO. 22



HEARING OPENS MONDAY

The Labor Board hearing is scheduled to open Monday morning at 10:00 A. M. The Government will then begin airing the facts on the discharge cases, and numerous other unfair labor practice charges.

Famous-Barr employees will want to avail themselves of every opportunity to hear all they can of the proceedings. We want you to hear Famous-Barr bosses and their stooges trying to explain to Uncle Sam all their acts to pervent people from joining and participating in the activities of Local 372-CIO.

It will be impossible to notify you very far in advance how late the hearing will continue each evening, or when there will be night sessions. Keep in close touch with the union office every day. Come in on your lunch hour. Drop in after work. We will keep you informed as far ahead as possible, when sessions will be held that you can attend.

It will be impossible to notify you very far in advance how late the hearing will continue each evening, or when there will be night sessions. Keep in close touch with the union office every day. Come in on your lunch hour. Drop in after work. We will keep you informed as far ahead as possible, when sessions will be held that you can attend.

We will of course give the highlights of the hearing in Famous Sayings. We will also distribut leaflets to the public, and give them details of the hearing which may not appear in the daily papers. But the only way to hear in detail what is brought out in every hearing is to attend every session you possibly can.

You will have the pleasure of hearing Famous-Barr executives try to explain why they instituted the infamous Gestapo rule against soliciting for the CIO, while allowing every other type of solicitation to continue, and in many cases actually encouraging it.

You will hear the "Big Shots" try to explain why they spied, and threatened, and intimidated, You will hear them try to explain away the presence of hired detectives in the Store.

Famous-Barr employees have waited a long time for the Government to tell the company to keep its nose out of their organizational activities. At last you have the opportunity to hear evidence brought forth, proving the many acts of law violation of which we are all well aware.

COME IN MONDAY NIGHT!

Monday afternoon the Master Committee will receive a full report on the first day of the hearing. You are invited to hear this report. We may also be able to tell you what is coming up next, and when there will be a night session.

We will also discuss filing more election petitions. Perhaps your department will be included in this discussion. So remember. Don't miss this meeting, Monday right after WORK.

(CIO MADE) (OVER)

137-138

NATIONAL LABOR RELATIONS BOARD EXHIBIT NO. 1-2
CASE NO. 14-C-
IN THE MATTER OF
DATE 8/7 WITNESS Verduin
MABEL E. FISHER, Official Reporter

Intervener's Exhibit 12.

LET'S TALK UNIT"

In future issues of Famous Sayings you will read a great deal about "bargaining units."

What is a bargaining unit?

It is a term used by the Labor Board to designate a group of employees whose work would make their interests such that they, as a group, could properly bargain for wages, hours, and working conditions.

One such group is the tailors, for whom we have already filed an election petition. These may be considered as a few others:

All clothing salesmen; the shoe departments; St. Charles Warehouse; the toy department; porters and maids; Ladies' Alteration. There are numerous others, some well defined by past Board decisions, others not so clearly defined.

This gives you some idea of what is meant by the term, bargaining unit. We want to proceed at Famous-Barr unit by unit, until the time comes when we can petition for the entire store.

Where we will petition next depends upon only one thing. That is which group is ready next.

How does your unit stand? Can you define who would be included in a unit doing the type of work you do?

These are matters which we must determine. We can only do so with your assistance.

THEY'LL BE BACK

RUTH MARCHAND'S story goes back quite a ways. She started at Famous-Barr more than 16 years ago.

She worked hard, and finally was given a trusted position in the office of the Toy Department.

Last summer Agnes Saar, Toy Dep't. Cashier, joined the CIO. She asked the other girls to join. With the exception of two or three, they joined.

Agnes was called to McCarthy's office and given a two weeks' layoff--the first to get it in the neck over the Gestapo rule.

Agnes immediately got a good job a few days later, and did not report back when her two weeks was up. But that did not alter the activity of the Toy Department girls, as the bosses had hoped it would.

The bosses were really worried. Many non-selling employees had joined the CIO, but for the first time an entire department of salespeople joined the union.

Shortly after the Labor Board settlement, Ruth Moore got the axe in the Toy Department.

Ruth Marchand was elected co-secretary of Local 372 at the first Store-Wide meeting.

A little later she became ill, was off for some time, worked one day, and stayed home ill for several weeks.

These are matters which we must determine. We can only do so with your assistance.

Some people have already come into the office and discussed their unit with us. They are proceeding to help prepare for an election petition.

The hearing on the discharge cases will take a great deal of time. But we want to continue at the same time on the unit election petitions.

Every employee in the store can give a hand on this. Drop into the union office today, and let's get together on this job.

Again, remember the very important Master Committee meeting Monday right after work. The unit petitions will be one of the main points on the agenda.

The organizing job at Famous must not be neglected during the hearing. Let's not lose time.

A little later she became ill, was off for some time, worked one day, and stayed home ill for several weeks.

On each occasion she gave the company proper notice. Finally she was well enough to return to her job. But the company notified her she was no longer on the payroll.

She wrote McCarthy, asking why she had been discharged, and telling him she was ready to return to work. His answer said he would consider her application for re-employment!

You see, Famous-Barr is a very clever company. (So they think.) They have other means beside the Gestapo rule for getting rid of active CIO members.

Well, we'll let Uncle Sam make the decision on just how clever Famous-Barr is.

It seems to us we've heard something to the effect that there is no PERFECT CRIME.

Intervener's Exhibit 15.

FAMOUS SAYINGS

Published by the Department Store Employees Union---Local 372--CIO.

Room 205 Commercial Bldg, 214 North Sixth Street

CHestnut 7157----9548

VOL. I. OCT. 30, 1942. NO. 61.

WRITING THE CONTRACT!

We are preparing for negotiations as rapidly as possible. We are holding floor meetings and department meetings. Wages and conditions in each department are being discussed and exactly what the people in each department want is being put down on paper.

After many smaller meetings, the entire contract will then be presented to a Store-Wide meeting for final discussion. Any necessary changes will be made. Then the contract will be voted on and presented in its final form to Famous-Barr management.

Watch FAMOUS SAYINGS for meeting announcements. Get your entire department to attend your meetings. Be sure you have exactly what you want in the contract.

Everyone has ideas as to which conditions in the store should be improved or eliminated. We want everyone's opinion. Regardless of what department you work in, you can contribute something toward writing the best contract possible. DON'T MISS YOUR DEPARTMENT OR FLOOR MEETING!!

Local 372 CIO is going to negotiate a contract with Famous-Barr management. There is no question about it.

Local 372 CIO is going to negotiate a contract with Famous-Barr management. There is no question about it.

However, there is a question as to the kind of earnings and conditions we will get at Famous-Barr.

It will be up to you who have not yet joined Local 372 CIO to decide this. We have stated repeatedly, and we must now state it again. 60% membership means a 60% contract. 90% membership will mean we can get all our major demands.

Whether you join before the contract is signed, or afterward, we will all live under the conditions established in the contract.

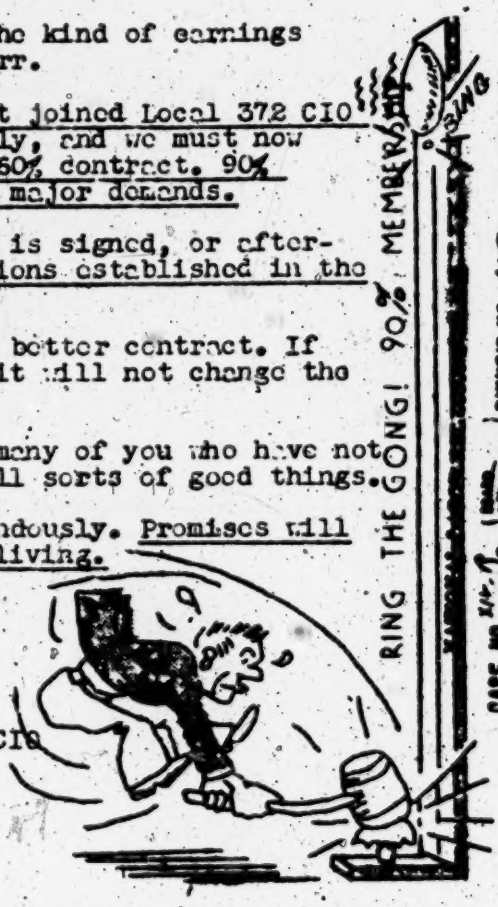
If you join now, you will help get a better contract. If you join after the contract is signed, it will not change the contract which is already signed.

The company will undoubtly approach many of you who have not joined Local 372 CIO, and promise you all sorts of good things.

The cost of living has gone up tremendously. Promises will not take care of the increased cost of living. The 50¢ or $1 a week raises which the company is giving is only an attempt to buy you off from joining the union and permanently improving your job.

Look ahead. You must prepare for security after the war. Join Local 372 CIO and make your job a better one, NOW and AFTER the war is over.

BE SURE TO ATTEND YOUR DEPARTMENT MEETING!!!!



CIO MADE. JOIN LOCAL 372 TODAY! OVER

Intervenor's Exhibit 15.

THINGS YOU OUGHT TO KNOW ABOUT WAGE FREEZING

① NOW THAT WAGES ARE FROZEN CAN I GET A RAISE THROUGH MY OWN EFFORTS?

ANSWER: As a practical matter you cannot, except in rare cases. There are too many legal stops to go through.

② HOW CAN I GET A RAISE?

ANSWER: Only through a bona-fide Union like Local 372 CIO.

③ BUT I THOUGHT ALL WAGES ARE FROZEN?

ANSWER: No, not all. The presidential decree says that increases in salary, commissions p.m.'s etc. can be made if "such increase is necessary to correct gross INEQUITIES, or to eliminate sub-standards of living. Famous-Barr employees DEFINITELY fall under the provisions of this paragraph.

④ HOW WILL LOCAL 372 CIO GET ME A RAISE?

ANSWER: Local 372 CIO will fist negotiate with Famous-Barr. If the company refuses decent increases then Local 372 CIO will file a petition with the War Labor Board stating the company's wages are below that necessary for a minimum living wage and that the earnings are below organized department stores. We feel certain that the War Labor Board will agree with us on that.

⑤ CAN THE UNION GET WOMEN'S PAY RAISED TO THAT OF MEN DOING THE SAME WORK?

ANSWER: The War Labor Board, in the Browne and Sharpe case four weeks ago, ruled that women must be paid the same wages as men for the same work.

We believe we can get higher wages for most of the women to equal that of men.

MASTER COMMITTEE
MEETING MONDAY NOV. 2

RIGHT AFTER WORK

LADIES
ALTERATION DEPT.
TONIGHT
RIGHT AFTER WORK

ALL ST. CHARLES
EMPLOYEES
TONIGHT
RIGHT AFTER WORK
205 COMMERCIAL BLDG.

DON'T MAKE A DATE
FOR
SATURDAY NITE-NOV. 7TH
WATCH FOR
MONDAYS LEAFLET !

153=158

[fol. 159] INTERVENER'S EXHIBIT 17

Date 5/7/43—Witness Verderber

B. 1a

United States of America

Before the National Labor Relations Board 14th Region

In the Matter of THE MAY DEPARTMENT STORES COMPANY, d/b/as Famous-Barr Company (Name of company) and Department Stores Employees Union, Local 372 Affiliated with United Retail, Wholesale & Department Store Employees of America, CIO. (Name of petitioner)

Case No. XIV R 508

Date Filed November 6, 1942

Petition for Investigation and Certification of Representatives Pursuant to Section 9 (c) of the National Labor Relations Act

1. Name of employer The May Department Stores Company, d/b/as Famous-Barr Company.

2. Address 6th-7th-Olive-Locust Streets, St. Louis, Missouri.

3. General nature of business Retail department store.

4. Description of the bargaining unit which petitioner claims is appropriate.

4. All selling employees at the company's store at 6th-7th-Olive-Locust Streets, St. Louis, Mo.; excluding supervisory employees (buyers, assistant buyers, floorwalkers, floor men, department managers, assistant department managers, store executives, office employees, merchandise men and other supervisory employees), all demonstrators who are not employed by Famous-Barr and all those who work for concessions, all regular extras and temporary extras, [fol. 160] all seasonal employees, and all part-time employees; all non-selling employees at the company's store at 6th-7th-Olive-Locust Streets, St. Louis, Mo. and the St. Charles Street supply house, excluding all Spring Ave. employees, all employees now under agreement with other

labor organizations, all confidential employees, such as secretaries, watchmen, detectives, and other service employees, all office and clerical employees, all supervisory employees, all personnel office employees, all timekeepers, all educational office employees, all welfare employees, all group insurance employees, all telephone operators, all customer service employees, all parking lot attendants, all garage employees, all footmen and doormen, all paymaster department employees, all fixture wrecking employees, publicity manager and his assistants, copyrighters and proofreaders, artists, sign writers, basement copyrighters and proofreaders, basement artists, credit promotion department employees, exhibit hall attendants, direct mail department employees, interior display creations department, traffic office employees, mail order department, phone order department, ecclesiastical mail order department, decorateria department, ice cream shop employees, stove repair employees, candy workroom, bake shop employees, dress-making instruction employees, addressograph employees, unit control employees, merchandise comparison and style coordination employees.

5. Approximate number of employees in such unit 2,500.

6. Approximate total number of employees in plant or plants involved 3,500.

7. Number or percentage of employees in such unit who have designated or selected petitioner to be their representative for collective bargaining More than 51%.

8. Who is the present bargaining representative of employes? None.

9. Names, addresses, and affiliations of any other known individuals or labor organizations who claim to represent any of the employees in such bargaining unit None.

10. Is there an existing or recently expired contract and if so give expiration date? No.

[fol. 161] 11. The undersigned hereby alleges that a question has arisen concerning the representation of the employees in the above bargaining unit, in that:

11. on or about October 28, 1942, petitioner notified the company by registered letter that it represented a majority of the employees within the above unit. At conferences

on November 2nd and 6th between duly designated representatives of the petitioner and the company, the company did not recognize petitioner as the bargaining agent as requested. Petitioner requests certification as the exclusive bargaining agent for all of the employees within the above-named unit.

The undersigned further alleges that said question concerning representation is a question affecting commerce within the meaning of said act.

The undersigned requests that pursuant to section 9(c) of the National Labor Relations Act, the National Labor Relations Board investigate such controversy and certify to the parties the name or names of the representatives that have been designated or selected by said employees.

Name and address of employees or representatives filing the petition. (If made by a labor organization, give also the full name, local number and affiliation of the organization and the name and official position of the person acting for the organization.)

Department Stores Employees Union, Local 372, affiliated with United Retail, Wholesale & Department Store Employees of America, CIO. By Ben Shein, International Representative, 205 Commercial Building, 214 N. 6th St., St. Louis, Missouri. Tel. CHestnut 7157.

Committee Representing Local 372: Nora Wahl, Capitola Juergens, Clara A. [illegible]shing, Clarence C. Hartmann.

[fol. 162] Subscribed and sworn to before me this 6th day of November, 1942 at St. Louis, Missouri. (S.) Leonard M. Brin, Field Examiner. (Seal.)

INTERVENER'S EXHIBIT 18

Date 5/7/43—Witness Verderber

DECISION AND ORDER

United States of America

Before the National Labor Relations Board

Case No. R-4580

In the Matter of THE MAY DEPARTMENT STORES COMPANY, Doing Business as Famous-Barr Company

and

DEPARTMENT STORES EMPLOYEES UNION, LOCAL 372, Affiliated with United Retail, Wholesale & Department Store Employees of America, C. I. O.

Mr. Charles K. Hackler, for the Board.

Mr. Milton H. Tucker and Mr. Robert T. Burch, of St. Louis, Mo., for the Company.

Mr. M. J. Levin, Mr. Victor B. Harris, and Mr. Ben Schein, of St. Louis, Mo., and Mr. Francis Heisler, of Chicago, Ill., for the C. I. O.

Mr. Herbert S. Thatcher, of Washington, D. C., and Mr. Elmer P. Theiss, Mr. Don Ellinger; Miss Verna Grayson, Mr. J. T. Latham, and Mr. Daniel J. Murphy, of St. Louis, Mo., for the A. F. of L.

Miss Viola James, of counsel to the Board.

[fol. 163] Statement of the Case

Upon petition duly filed by Department Stores Employees Union, Local 372, affiliated with United Retail, Wholesale & Department Store Employees of America and Congress of Industrial Organizations, herein called the C. I. O., alleging that a question affecting commerce had arisen concerning the representation of employees of The May Department Stores Company, doing business as Famous-Barr Company, St. Louis, Missouri, herein called the Company, the National Labor Relations Board provided for an

appropriate hearing upon due notice before Will Maslow, Trial Examiner. Said hearing was held at St. Louis, Missouri, on November 18, 21, and 23, 1942. The Board, the Company, the C. I. O., and the American Federation of Labor and its affiliated International Unions, herein collectively called the A. F. of L., appeared and participated. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. The Trial Examiner's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

On December 3, 1942, the A. F. of L. and the Company filed briefs. On December 4, 1942, the C. I. O. filed a brief, and on December 7, 1942, the Company filed a reply brief. All the briefs have been considered by the Board. The Company, in its briefs, moved to dismiss the petition of the C. I. O. for the reason that neither the C. I. O. nor the A. F. of L. made a sufficient showing of representation, and for the reason that the unit sought by the C. I. O. is inappropriate. For the reasons stated below, the motion is granted.

Upon the entire record in the case, the Board makes the following:

Findings of Fact

I. The business of the Company

The May Department Stores Company is a New York corporation, owning and operating several large department stores in various parts of the country. One of these is the Famous-Barr Company at St. Louis, Missouri, whose [fol. 164] employees are involved herein. At St. Louis, the Company owns and operates a main store and several warehouses, and is engaged in the business of selling merchandise and service. During the last year, the Company purchased and transported merchandise, valued at approximately $27,000,000, approximately 70 percent of which was transported to the Company from points outside the State of Missouri. During the same period, the Company sold and transported merchandise in excess of $27,000,000 in value, of which approximately 12 percent was transported from St. Louis to points outside the State of Missouri. We

find that the Company is engaged in commerce within the meaning of the National Labor Relations Act.[1]

II. The organizations involved

Department Stores Employees Union, Local 372, affiliated with United Retail, Wholesale & Department Store Employes of America and the Congress of Industrial Organizations, and the American Federation of Labor and its affiliated International Unions, are labor organizations, each admitting to membership employees of the Company.

III. The alleged question concerning representation

On October 28, 1942, the C. I. O. requested recognition as the bargaining agent for the Company's employees, and conferences between the Company and the C. I. O. were held on November 2 and 9, 1942. Thereafter, the Company refused the bargaining request on the ground that the unit sought by the C. I. O. was not appropriate.

The parties agreed on a company-wide unit, including the employees of the main store and the St. Charles Street warehouse, but excluding, in general terms, supervisory, managerial, executive, confidential, and temporary employees; employees who are covered by existing contracts; and the Spring Avenue warehouse employees. The parties are in disagreement, however, as to whether numerous [fol. 165] classifications of employees should be included or excluded, and they also differ in regard to the precise definition of various categories. In general terms, the C. I. O. would exclude, and the A. F. of L. and the Company would include, regular extra, part-time, and seasonal employees; employees in leased departments and demonstrators; the Pine Street warehouse employees and other "outside" employees; employees who have special skills; and office and clerical employees.

The Company is a large department store, and utilizes in its business numerous buildings, among them a main store, 3 warehouses, and a customers' garage. As shown

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[1] See Matter of The May Department Stores Company, doing business as The May Company, and Retail Clerks International Protective Association, Retail Shoe Salesmen, Local Union No. 420, A. F. of L., et al., 39 N. L. R. B. 471.

by the payroll, the functions of the Company are divided into more than 350 departments. There is only 1 pay roll for all the employees, and it indicates no differentiation between clerical and non-clerical, or selling and non-selling employees. All employment and personnel policies are handled and directed through a central office. Generally the working conditions of all the employees are the same. Without discussing in detail all the groups in issue, and without making a final determination of the unit, the record shows that 2 large disputed groups, regular extra employees and office and clerical employees, many of whom are closely attached to selling departments, should not be excluded from the unit, contrary to the contention of the C. I. O.

The Company, like other department stores, maintains a list of regular extra employees on whom it calls to meet the normal fluctuations of business. There were 778 "regular selling extras" and 201 "regular non-selling extras,"[2] on the pay roll submitted to the Trial Examiner. These employees do not work on fixed days, but work whenever the Company needs them. They may work a whole week or several days or 1 or 2 days a week or month. They are assigned to various departments and may be shifted about during the day. Their salaries are comparable to those of the regular employees of the Company, and their working [fol. 166] conditions are generally the same. Because of insurance requirements, they do not participate in group insurance and the employees' Welfare Association. However, they are allowed discounts for their own purchases from the Company, and they receive Christmas bonuses. Generally, they perform the same duties as regular extras whom we included in a unit established as appropriate in another store owned by the same Company.[3] On the basis of the present record, we are of the opinion that they properly

[2] "Regular selling extras" are those employees on the regular extra list who work in selling departments. "Regular non-selling extras" are those on the regular extra list who work in non-selling departments, and apparently may include clerical, office, stockroom, warehouse, and any employees who do not make sales to customers.

[3] See Matter of The May Department Stores Company, doing business as The May Company, and Retail Clerks International Protective Association, Retail Shoe Salesmen Local Union No. 420, A. F. of L., et al., 39 N. L. R. B. 471.

should be included in a unit with regular full-time employees.

There are approximately 650 to 700 employees whom the C. I. O. would exclude on the ground that they are office and clerical employees. While about half of these appear to be engaged in strictly office and clerical work, most of the remainder, who are assigned to various selling and non-selling departments, are in frequent contact with customers and perform duties closely allied with those of other employees whom the C. I. O. would include. It is apparent from the record that they have the same working conditions and benefits as other regular employees of the Company. So-called office and clerical employees in departments sought to be excluded by the C. I. O. are frequently transferred, both temporarily and permanently, to departments that the C. I. O. would include. Moreover, the office and clerical employees are eligible for membership in the C. I. O. While we do not decide that all office and clerical employees should be included, many of those in dispute clearly should be in an industrial unit with other employees sought by the C. I. O.[4]

Not only is the C. I. O.'s claimed unit inappropriate, but neither labor organization has made a substantial showing of representation in an appropriate unit. The C. I. O. submitted a total of 924 unduplicated membership application cards, bearing apparently genuine original signatures. [fol. 167] The November 7, 1942, pay roll listed 5,515 employees, although only 580 cards were found by the Trial Examiner to bear names appearing on this pay roll within the claimed unit, we assume for present purposes that most of the balance of the cards, which were not definitely established to be of persons not on the pay rolls because of difficulties involved in checking, also bear names of employees on the pay roll. With the inclusion of the regular extra employees and about half of the so-called office and clerical employees, the representation showing of the C. I. O. is not substantial. The A. F. of L. submitted only 127 designation cards at the hearing, which were not checked against the pay roll because they bore no indica-

[4] In addition to the regular extra and office and clerical employees, there are other smaller groups that the C. I. O. would exclude, but which might properly be included in an industrial unit.

tion of the department to which the person was assigned.

Since the unit proposed by the C. I. O. is inappropriate, and since neither the C. I. O. nor the A. F. of L. has presented evidence indicating that it represents a substantial number of employees in an appropriate unit, we hereby sustain the Company's motion to dismiss the petition.

Order

Upon the basis of the above findings of fact and the entire record in the case, the National Labor Relations Board hereby orders that the petition for investigation and certification of representatives of employees of The May Department Stores Company, doing business as the Famous-Barr Company, St. Louis, Missouri, filed by Department Stores Employees Union, Local 372, affiliated with United Retail, Wholesale & Department Store Employees of America, C. I. O., be, and it hereby is, dismissed.

Signed at Washington, D. C., this 24 day of December 1942.

Harry A. Millis, Chairman; Wm. M. Leiserson, Chairman, National Labor Relations Board. (Seal.)

[fol. 168] Company's Exhibit 1

Date 5/8/43—Witness McCarthy

Petitioning Union's Brief

Before the National Labor Relations Board

Case No. R-4580. Formerly Case XIV-R-508

In the Matter of The May Department Stores Company, d/b/a Famous-Barr Company

and

Department Store Employees Union, Local 372, Affiliated with United Retail, Wholesale & Department Store Employees of America, CIO

Statement

The United Retail, Wholesale & Department Store Employees of America, C. I. O., hereinafter called the "C. I. O.", filed the petition for certification, claiming to represent a

majority of the employees in The May Department Store Company's St. Louis retail store. This store, known as Famous-Barr Company, and usually so referred to in the record, is one of seven department stores operated by the May Department Stores Company located in various cities in the United States.

The unit sought by the C. I. O. stated in general terms, includes all regular selling and non-selling employees of the Company's retail store and connecting warehouse, called the St. Charles Street warehouse. The exclusions from this unit are: supervisory, office and clerical, confidential, extra and seasonal employees, protective employees, copywriters, proof-readers, artists, sign writers, window trimmers, employees of leased departments, demonstrators, and all employees now covered by existing contracts with other labor organizations.

* * * * * * *

[fol. 169] IV

Window Trimmers, Artists, Copywriters, Sign Painters, Advertising Men and Credit Promoters Should Be Excluded

Window trimmers, artists, copywriters, sign painters, advertising men and credit promoters, are sought to be excluded on the ground that they have specialized skill. The window trimmers belong to a guild of their own. Barbers and a few other employees who might be said to have specialized skill are included. However, there is no desire to be illogical. If this Board should decide that barbers, or any other employees are specialists, in the same sense of the word that window trimmers are, the C. I. O. has no objection to their exclusion from the unit.

* * * * * * *

Company's Exhibit 2

Date 5/8/43—Witness McCarthy

The Sale of a Suit of Clothes

The transaction begins with the preparation of the Buyer's buying plan in conference with the Merchandise

Manager before the Buyer goes to market. This involves reference to records prepared by the Comptroller's Office showing the amount of credit available for investment by the Buyer for that particular month or for that particular season. These records are made up in the Comptroller's Office by employees who work from accumulated figures involving sales today compared with purchases today during the fiscal year.

Upon the Buyer's return from market he prepares a promotional plan in conference with the Divisional Promotional Manager involving the use of various advertising media, dates of such use and amounts of money to be spent for promotion.

When the merchandise arrives from the manufacturer, it is delivered to the Receiving Platform, in the Kingston [fol. 170] Bldg., taken by elevator to the 3rd floor of the Kingston Bldg., and trucked to the Receiving Room on the 3rd floor of the Dolph Bldg.

In the meantime, the Buyer had sent a carbon copy of his original order to the Invoice Office in the Kingston Bldg., where it was checked for correct address, terms and shipping directions, and filed to await arrival of the invoice from the manufacturer. Upon receipt of the manufacturer's invoice the invoice was checked against the copy of the original order for quantity, terms and price. The Buyer is then notified to come to the Invoice Office and insert on the original invoices the retail prices to which the items will be sold.

After arrival of the merchandise itself, the checker from the Receiving Room secures the invoice from the Invoice Office and proceeds to make a physical comparison between the numbers and items of the shipment and the entries on the invoice itself.

The invoice is then filed by the checker and sent to the price-tag printer who prepares price tags for the merchandise. The price-tag printer returns the price tags with the invoice to the Receiving Room where the merchandise is marked. The invoice signed by the checker is then returned to the Invoice Office and the marked merchandise is sent to the stockroom or to the selling floor, generally the latter.

Completed invoices are delivered by an employe of the Invoice Office to the Accounts Receivable Office daily, where the computation of terms and rates of payment are

made and in due course checks are issued for payment to the manufacturer.

The invoice is then sent to the Retail Inventory Office where the items thereon are transferred to records which form a perpetual inventory at retail of merchandise in the department.

In response to such advertising as has been inserted, or as the result of good-will created through former satisfactory purchases in this or any other department of the store, the customer comes in and makes a selection with the [fol. 171] assistance of the salesman. The salesman calls a fitter who takes the necessary measurements and makes notations on the suit itself, and on the alteration work ticket. The suit then goes to the Alteration Department for the necessary alterations.

If the sale is a cash sale, the customer's money is sent through the pneumatic tube to a cashier in the Basement Tube Room with the original of the sales check and change, if any, is returned with the Eagle stamp stub. The customer then takes the Eagle stamp stub to an Eagle stamp clerk, who gives the amount of Eagle stamps called for, one stamp for each 10¢ of purchase.

The cash taken in by the Tube Room cashier is turned in to the main Cashier's Office at the end of the day where it is counted and the cashier is given credit for the amount of cash turned in. The cash sales check is turned in at the Auditing Office at the end of the same day with other cash checks taken in by the same cashier where the total is run up and sent to the Cashier's Office the next day to balance against the money turned in. The cash sales check then goes through various clerical processes in the Auditing Office, in the course of which the sales check itself is marked off the sales check register, the department is given credit for the sale, the sales-person is given credit for the sale, and the necessary records for management are prepared.

If the sale is a charge, the original sales check goes to the Charge Authorizing section of the Credit Office, where it is compared with a card index already set up by employes of the Credit Office who previously have opened an account for the customer and investigated his credit references. A detachable stub is returned to the sales-person from the Credit Office, showing that the account is good for the amount of the purchase. The remainder of the charge

sales check is then sent to the Bookkeeping Office where it is sorted alphabetically with other checks received on the same day. These checks are divided into bunches corresponding to each separate ledger in the Accounts Receivable Office and totaled to furnish a control figure for the head bookkeeper. Another detachable stub is then taken [fol. 172] off the sales check and sent to the Auditing Office where it goes through clerical processes similar to those previously described in the case of cash sales checks. That is, it is marked off the sales check register and sorted by departments so as to give the department credit for the sale, and re-sorted by salesperson's number to give the salesperson credit for the sale, and the necessary records for management are prepared.

At the end of the month a statement of the customer's purchases, if any, in addition to the purchase of the suit, is written up in duplicate on a monthly statement.

These monthly statements are inserted into mailing envelopes, and these mailing envelopes are sent to the Mailing Office where employes of the Contingent Force separate envelopes requiring 2¢ postage from envelopes requiring 3¢ postage, and the envelopes are then run though the postage meter machine by employes of the Mailing Office who package them for delivery to the Post Office.

The customer may pay his bill by calling in person at the Accounts Receivable cashier's desk on the 2nd Floor of the store or on the 9th Floor of the store where he pays in the money and receives a receipt therefor, or he may send in his remittance by mail in an envelope furnished for that purpose with the statement. These envelopes are opened and contents recorded by other employes of the Accounts Receivable cashier's division, some of whom are extra employes only engaged for the peak period each month, and some of whom are transferred monthly for this peak period from other cashing or clerical duties in other departments.

If this customer's account is not paid by the 1st of the following month, a statement to that effect is prepared by the Accounts Receivable Bookkeeper and sent to the Collection Department where a reminder is prepared and sent through the mail by clerical employes of the Collection Department. If the account is not paid by the 10th of the following month, an employe of the Collection Department issues a "Frozen Account" memorandum in several copies.

One is sent to the manager of the Credit Department, another is sent to each of the Charge Authorization card [fol. 173] files, another is sent to the bookkeeper and one is retained in the Collection Department, and a letter with reference to the freezing of the account is sent to the customer. If after the 15th, of the following month, remittance has not been received, a collection card is made up in the Collection Department from which a series of collection letters are sent to the customer, and in exceptional cases an order is issued to an outside collector to call on the customer to solicit payment.

If the purchase is made on a C. O. D. basis, the required part payment is turned in by pneumatic tube to the Tube Room cashier and the original sales check is sent at the end of the day to the C. O. D. Bookkeeping Department where it is entered in a C. O. D. Accounts Receivable register, and a stub from this sales check is sent to the Auditing Office where it goes through the auditing process already described.

Similarly, if the transaction is a "Will Call", the down payment is handled by the Tube Room cashier and the original check goes to the Will Call bookkeeper, and the stub from the original check goes to the Auditing Office.

When the alterations on the suit are completed and have been approved by the examiner, the suit is sent to a storage bin or wrapping desk adjacent to the Alteration Department. The employes in this department are not on the payroll of the selling department or of the Alteration Department. If the alteration ticket indicates that the customer is to come in for a fitting, the suit is put in a large storage bin provided for that purpose and held for the customer's pleasure. As soon as the customer has indicated his satisfaction with the alterations, or in cases the customer is not to come in for a fitting, the suit is packed in a card-board box for delivery by employes at this same desk. It is then picked up by a package collector and sent by spiral chute to the conveyor belt to the Kingston Bldg., where it is packed in large steel trucks known as "tanks", and transported from the loading dock of the Kingston Bldg., to the Delivery Department at Spring Avenue. There the package is sorted into the bin corresponding to the address of the customer, entry of the package is made by a Delivery De- [fol. 174] partment entry clerk, and on the following day

or on the second following day the package is taken to the customer's home by the driver and his helper.

Other departments of the store which may be involved in this transaction, would include the Credit Account Adjustment Bureau in case an error in the preparation of the monthly statement, or the main Adjustment Bureau on the 11th Floor, in case some dissatisfaction with the merchandise arose, and in either case the customer might make his complaint by telephone which would be handled through the Telephone Order board.

BEFORE THE NATIONAL LABOR RELATIONS BOARD, FOURTEENTH REGION

Case No. 14-C-872

In the Matter of MAY DEPARTMENT STORES COMPANY, doing business as Famous-Barr Company

and

ST. LOUIS JOINT COUNCIL, UNITED RETAIL, WHOLESALE & DEPARTMENT STORE EMPLOYEES OF AMERICA, CIO

Report of Proceedings

Room 1413 International Office Bldg., 722 Chestnut St., St. Louis, Missouri

October 14, 1943.

The above entitled matter came on for hearing, at ten o'clock A. M., pursuant to notice.

Before William E. Spencer, Trial Examiner.

[fol. 175] APPEARANCES:

Charles K. Hackler, 1416 International Office Bldg., St. Louis, Mo., appeared for National Labor Relations Board.

Lewis, Rice, Tucker, Allen & Chubb, by Milson H. Tucker and Robert T. Burch, 208 N. Broadway, St. Louis, Mo., appeared for respondent.

Emanuel Boggs, Suite 924, 705 Olive St., St. Louis, Mo., appeared for United Retail, Wholesale & Department Store Employees of America, CIO.

Trial Examiner Spencer: The Trial Examiner will allow an automatic exception to all adverse rulings, and upon appropriate order an objection and exception will be permitted to stand to an entire line of questioning.

. . . . . .

Mr. Hackler: I have had the reporter mark for identification Board's Exhibit 7, a copy of a letter from H. J. Gibbons, director, St. Louis Joint Council, URWDSEA, to Mr. F. Z. Salomon, of the Famous Barr store. The letter bears date of July 8, 1943, and to the exhibit is attached a return mail receipt evidencing the receipt of that letter by Mr. F. Z. Salomon. Can it be stipulated in that connection, Mr. Tucker, that the original of Board's Exhibit 7 was received by Mr. F. Z. Salomon in due course of post after July 8th, 1943; was received as indicated on the return mail receipt?

Mr. Tucker: Yes, sir.

Mr. Hackler: Can it be stipulated what the title of Mr. F. Z. Salomon is with the company?

Mr. Tucker: Vice-President and General manager.

(The document referred to was thereupon marked for identification, Board's Exhibit 7.)

Mr. Hackler: Together with the stipulations, I now offer Board's Exhibit 7.

[fol. 176] Trial Examiner Spencer: Any objection? No objection; it will be received.

(The document referred to marked for identification Board's Exhibit 7 was thereupon received in evidence.)

Mr. Hackler: The reporter has marked as Board's Exhibit 8, a copy of a letter from Mr. Fred Z. Salomon, Vice-President and General Manager of the Famous Barr store to Mr. H. J. Gibbons, the writer of Board's Exhibit 7, and which is a reply to the letter of Mr. Gibbons.

(The document referred to was thereupon marked for identification, Board's Exhibit 8.)

Mr. Hackler: Can it be stipulated, Mr. Tucker, that Board's Exhibit 8 is a true and correct copy of the reply letter of Mr. Salomon to Mr. Gibbons, and that it was sent by Mr. Salomon and received by Mr. Gibbons in due course of post?

Mr. Tucker: What is the date?

Mr. Hackler: The date this letter bears is July 19, 1943.

Mr. Tucker: Yes.

Mr. Hackler: With the stipulation, I offer in evidence Board's Exhibit 8.

Trial Examiner Spencer: Any objections?

Mr. Tucker: No, sir.

Trial Examiner Spencer: Received. No objection.

(The document referred to marked for identification Board's Exhibit 8 was thereupon received in evidence.)

Trial Examiner Spencer: You are getting duplicates of these, are you?

Mr. Hackler: Yes; duplicates of all these exhibits have been supplied with the exception of Company's Amended Answer which they will supply before the hearing closes.

Mr. Tucker: There they are now.

Mr. Hackler: I have had marked as Board's Exhibit 9, a document consisting of nine typewritten printed sheets [fol. 177] which is an application filed by May Department Stores Company with the United States Department of Labor, Wage and Hour and Public Contracts Division, Kansas City. This bears the date of August 30th, 1943. Attached to the formal application is a covering letter with reference to the application signed by Mr. Fred Z. Salomon as Vice-President of the Company.

(The document referred to was thereupon marked for identification, Board's Exhibit 9.)

Mr. Hackler: Can it be stipulated, Mr. Tucker, that the document, Board's Exhibit 9 is a photostatic copy of the application and covering letter?

Mr. Tucker: Yes, it can be stipulated that it is a photostatic copy of what it purports to be a copy of; but subject to my right to check and call to the attention of the Examiner, any inaccuracies I may detect. If I don't call attention to any, there are none: but without however waiving my claim that I intend to make as to relevancy and materiality when it is offered in evidence.

Mr. Hackler: I wish to offer in evidence at this time Board's Exhibit 9 consisting of the covering letter and the application.

Mr. Tucker: Object on the ground it is immaterial and irrelevant and incompetent.

Trial Examiner Spencer: What is the purpose of offering it?

Mr. Hackler: Directing your attention, Mr. Examiner, to the complaint in this case, it will be noted that the complaint alleges in paragraph 5 that the Board has found in a previous representation case that a unit consisting of all employees engaged by the respondent in the busheling room, second floor, department 280, and in the busheling room, basement, department 281, including regular extra employes but excluding the two foremen and all other employes of the company as a unit appropriate for purposes of collective bargaining. Paragraph 6 then alleges that the charging union in this case won a Board ordered election held among the employes of that unit and the union [fol. 178] was certified as bargaining representative. Paragraph 7 then, beginning at the middle alleges that on the 31st day of August, 1943 despite the certification of this union as exclusive representative of the busheling department, that despite that certification the respondent in this case took steps unilaterally to secure the necessary approval by the National War Labor Board of certain changes with respect to such wages, rates of pay, hours of employment and other conditions of employment of the employees in this busheling unit. I offer this exhibit, which is the application so filed by the company in support of that allegation of the complaint. It will be noted also that in paragraph number 9 of the complaint, substantially the same allegation appears wherein the same act is alleged to be a violation of Section 8-1 of the Act. Now, it is my contention and the complaint bears out, that the company is on notice of such a contention, that after the certification of this union the act of the respondent in seeking necessary governmental approval for unilateral wage increase among the busheling employes as well as the rest of the store was an act that amounts to a refusal to bargain under Section 8-5 of the Act. Further, that regardless of their position that it is also in and of itself a violation of Section 8-1 of the Act. It is offered for the purpose of showing that conduct on the part of the company.

Trial Examiner Spencer: Do you care to be heard on your objection?

Mr. Tucker: No; I think it is sufficient to state it is immaterial as tending to prove even that contention.

Trial Examiner Spencer: The objection is overruled. You may proceed.

(The document referred to marked for identification, Board's Exhibit 9 was thereupon received in evidence.)

(Brief recess at 11:00 A. M.)

Mr. Hackler: I had the reporter mark as Board's Exhibit 10 a document consisting of two typewritten pages which purports to be a copy of a speech delivered by Griffin McCarthy over a public address system which extends through-[fol. 179] out the respondent's store and the adjoining St. Charles Street warehouse. Can it be stipulated, Mr. Tucker, that Board's Exhibit 10 is a true and correct copy of the remarks made by Mr. McCarthy, and that those remarks were made on the first day of September, 1943, about fifteen minutes until nine o'clock a. m., that the remarks were made over the public address system and that employes were at their places of work where they could hear that speech?

Mr. Tucker: Well, I don't know where the employes were. I can't make any stipulation about that, but I can stipulate that the speech was made over the public address system at that time of day, approximately a quarter to nine.

(Thereupon the document above referred to was marked Board's Exhibit No. 10 for identification.)

Mr. Hackler: Well, all I want with respect to the stipulation——

Mr. Tucker: But undoubtedly a number of employes heard it.

Trial Examiner Spencer: Well, was the statement made to the employes, was it addressed to them?

Mr. Tucker: Yes, sir.

Trial Examiner Spencer: I think we can reasonably assume that some of the employes were there to hear it.

Mr. Hackler: Can we stipulate the employes' hour to go to work, both in the case of selling and non-selling employes was either a quarter to nine, at the time it was delivered, or before a quarter to nine?

Mr. Tucker: I can stipulate a large proportion of the employes are supposed to be on duty by a quarter to nine in the morning.

Mr. Hackler: And it was designed to be a communication to employes?

Mr. Tucker: To reach a large proportion of employes.

[fol. 180] Mr. Hackler: Will you state for the record the exact title of Mr. McCarthy in the store?

Mr. Tucker: He is superintendent of employment.

Now, that stipulation, of course, is without detracting in any way from the objection I propose to make as to materiality.

Trial Examiner Spencer: That is understood.

Mr. Hackler: Together with the facts of the stipulation and as explained by it, we now offer Board's Exhibit 10.

Trial Examiner Spencer: Any objection?

Mr. Tucker: Objected to on the ground it is incompetent, immaterial and irrelevant.

Trial Examiner Spencer: What do you propose to show by this exhibit, Mr. Hackler?

Mr. Hackler: I direct your attention to the last allegation in paragraph 7 of the complaint and the last allegation in paragraph 9 of the complaint. I offer this in evidence for the purpose of proving those allegations, for the purpose of showing that this company, after filing its application for a wage increase covering the busheling departments gave publicity to the act of filing that application and, on my theory of the case, tended thereby, by its conduct, to undermine the union's majority representation in this busheling unit and further interfered with, restrained and coerced the employes, particularly the employes of this busheling unit.

Trial Examiner Spencer: Do you care to be heard on the objection, Mr. Tucker?

Mr. Tucker: Yes, I would just like to say we admit we announced that the increase had been applied for; but the speech is immaterial, and the admission is immaterial, and that it is unnecessary to introduce the speech in evidence to obtain that fact in the record; I am perfectly willing to admit that we announced the increase to the employes.

Mr. Hackler: I think I ought to be permitted to show the circumstances under which it is announced. My theory is that a union, certified as its exclusive bargaining repre-

[fol. 181] sentative, that any act of the company that tends or has a reasonable tendency to lead the employes to withdraw their support to the bargaining representative,

that that is a violation of both Section 7 (5) and Section 8 (1). I think I should be permitted to show that a statement was made to all employes when they were at their places of work and those who were present had no choice but to listen, advising them in no uncertain terms that this company had sought unilaterally to affect the wages, hours and working conditions of the section of those employes who had legally designated a collective bargaining representative before. I further offer to show in connection with the earlier exhibit which is the War Labor Board application for the wage increase, that no reference was made in the speech to employes concerning the possible position that the certified bargaining representative might take with reference to these busheling employes, although the War Labor Board application had certain information to convey in that regard, and that's certainly immaterial, but by the exclusion of that, I take it that the speech was not a fair statement of what was happening, but was a statement that glossed over anti-union impulses behind the filing of the application for wage increase.

Trial Examiner Spencer: I am inclined to think it should be in. I will overrule the objection and receive it.

(The document heretofore marked Board's Exhibit No. 10 for identification was received in evidence.)

Mr. Hackler: It is stipulated and agreed by and between counsel for the respondent and the Board, subject to the right of counsel to make any legal objection to the admissibility of this material, that on the 11th day of September, 1943, a speech was made to the employes at approximately the same time of morning as Mr. McCarthy's speech; that this speech was made by F. Z. Salomon, whose name appears on the application for the wage increase and whose title has been stated in the record; that among other things, in the course of that speech, Mr. Salomon stated into the microphone, and it was carried over the public address system in the store and the St. Charles Street ware-[fol. 182] house, the following: "Good morning, everybody. On September 1st when we announced to you that the Famous-Barr Company had applied for permission to grant a general salary increase retroactive to August 2d, we told you that we would keep you informed as to the progress of our application; we have no news as to the progress of the application and we did not expect to talk to you again on

the subject as soon as this, and still less did we think it would be necessary to make such a statement as we now have to make."

And among other things, in the course of that speech, stated the following: "We have filed these applications in good faith and will do everything we can to secure their approval as soon as possible. We sincerely hope that nothing will occur which will delay or obstruct or prevent this approval."

The application referred to in the last quoted portion of the speech has reference, does it not, Mr. Tucker, to the War Labor Board wage application?

Mr. Tucker: That is right.

Mr. Hackler: I wish to offer in evidence the quoted portions of the speech of Salomon of September 11, 1943.

Mr. Tucker: I make the same objection, that they are immaterial, irrelevant and incompetent.

Trial Examiner Spencer: Objection overruled. Proceed.

Mr. Hackler? I have had marked as Board's Exhibit 11 a copy of a publication known as the Store Chat.

(Thereupon the document above referred to was marked Board's Exhibit No. 11 for identification.)

Mr. Tucker: I want to make further objection to the last offer and that is that it was not included in the petition or in the allegations of the petition, no reference to the speech.

Trial Examiner Spencer: Well, I suppose that the Board's contention is it would come under the general allegation. Do you care to make a statement on that, Mr. Hackler?

[fol. 183] Mr. Hackler: Yes, it comes under the following allegation, found in the last clause of paragraph 7 of the complaint, "and did on or about September 1, 1943, seek to undermine the union's majority representation in the unit by informing all employes engaged at its store, that respondent had unilaterally taken such steps and intended in the future to take other steps to secure necessary approval of the National War Labor Board therefor." And similarly, the last clause of paragraph 9 of the complaint which is in substance the same as the quoted portion of paragraph 7. If respondent's objection is to the fact that the complaint alleges the date as on or about September 1, 1943, and that this speech was not delivered by Mr. Salomon until the 11th day of September, I am certainly will-

ing to amend to include the latter date, as well as the on or about September 1st. Other than that, I can't see that it is outside—certainly not outside the general allegation, and it would seem somewhat technical to claim that it is outside the September 1st date; in any event, I might state that respondent can claim no surprise inasmuch as a subpoena was served on respondent addressed to it by registered mail, attention F. Z. Salomon, which, according to the return mail receipt, was received yesterday, so that, in that——

Mr. Tucker: What time, Mr. Hackler?

Mr. Hackler: The return mail receipt doesn't bear the time of the day; but I can make a formal exhibit of the subpoena if there is any claim of surprise; if there isn't, I won't put it in the record.

Mr. Tucker: There is no claim about surprise.

Mr. Hackler: I will state that into the record——

Trial Examiner Spencer: Objection overruled. Proceed.

Mr. Hackler: Mark this subpoena as Board's Exhibit 12.

(Thereupon the document above referred to was marked Board's Exhibit No. 12 for identification.)

Trial Examiner Spencer: I see no point in putting the subpoena in the record, there is no claim of surprise made.

Mr. Tucker: No, sir.

[fol. 184] Mr. Hackler: You concede a subpoena was issued yesterday calling for the production of Mr. Salomon's speech and those portions quoted, and you furnished me that record?

Mr. Tucker: That is right.

Mr. Hackler: With that stipulation I will not introduce this exhibit.

I have had the reporter mark Board's Exhibit 11, a publication entitled "Store Chat", bearing date of September 3, 1943. On the exhibit I have marked by a pencil notation a certain article appearing in that publication on the first page thereof, which, in offering the exhibit, I direct particular attention to.

In that connection, and subject to any right of objection, of course, can it be stipulated, Mr. Tucker, that the Store Chat is a publication issued each week to the employes of the store, that it is financed by the management of the store and furnished to the employes without cost to

them and is a general newspaper carrying items of general and personal interest to the employes?

Mr. Tucker: Well, as to the nature of the contents, I think that can be judged by the copy that you are offering in evidence; but I am willing to stipulate that it is distributed to the employes of the store periodically, at no expense to them, and at the expense of the company.

Mr. Hackler: And that the particular issue of Store Chat, here involved as Board's Exhibit 11, was distributed to the employes in the same manner as the distribution of any other issue of that newspaper?

Mr. Tucker: Yes.

Mr. Hackler: With that stipulation, I offer in evidence Board's Exhibit 11, particularly calling attention to the marked portion thereof.

Trial Examiner Spencer: Any objection?

Mr. Tucker: Yes; objected to as irrelevant, incompetent and immaterial.

[fol. 185] Trial Examiner Spencer: That relates to, still relates to the matter of application for wage increase, I believe?

Mr. Hackler: That is correct.

Trial Examiner Spencer: Consistent with my ruling, I will overrule the objection and receive it.

(The document heretofore marked Board's Exhibit No. 11 for identification was received in evidence.)

Mr. Hackler: It is stipulated by and between counsel for the respondent and for the Board that May Department Stores Company, a corporation, has registered with the Secretary of the State of Missouri a fictitious name registry of its store in St. Louis, Missouri, both as "Famous-Barr Company" and also as "Famous & Barr Company."

It is so stipulated, Mr. Tucker?

Mr. Tucker: Yes, sir. I might say, so that the record will—well, that is all right, yes, that is OK, it is stipulated.

Mr. Hackler: And the purpose of this stipulation is, that it appears from the decision of the Board in Case R-5331 that the company there referred to is referred to as Famous & Barr, whereas, in the formal document in this case it is referred to as Famous-Barr Company. It is stipulated that one and the same company is referred to there.

Mr. Tucker: Yes, that is stipulated; they are sometimes known as one and sometimes known as the other.

Mr. Hackler: And in each instance it is the May Department Stores operating under either or both of those names?

Mr. Tucker: That is right.

* * * * * * *

[fol. 186] BOARD'S EXHIBIT 7

Date 10/14/43—Witness —— ——

July 8th, 1943.

Mr. F. Z. Saloman, Famous Barr, 7th & Olive Streets, St. Louis, Missouri.

DEAR SIR:

As you know our organization has been designated Collective Bargaining Agency for certain employees of your Firm by the National Labor Relations Board which recently held an election.

I am writing to request conferences for the purposes of negotiating a contract governing wages, hours and working conditions for these employees.

Will you advise me as to the earliest possible date you can arrange to participate with us in these conferences.

Very truly yours, H. J. Gibbons, Director. St. Louis Joint Council, U. R. W. D. S. E. A.

HJG'L.
Registered Mail.

(Return receipt for registered article signed by F. Z. Saloman attached to letter omitted in printing.)

BOARD'S EXHIBIT 8

Date 10/14/43—Witness —— ——

July 19th, 1943.

Mr. H. J. Gibbons, Director, St. Louis Joint Council, URWDSEA, 705 Olive Street, St. Louis, Missouri.

DEAR SIR:

In reply to your letter of July 8th, requesting that we bargain with you for the Bushelmen, you are advised that [fol. 187] we decline to do so for the reason that we do not agree that your organization represents a majority of the employees within an appropriate unit, and we wish to preserve our full rights to question the recent decision of the National Labor Relations Board on that subject as we may see fit.

We also reserve the right to question the jurisdiction of the N. L. R. B. in the matter.

Yours truly, Famous Barr Company, by Fred Z. Saloman, Vice President and General Manager.

FZS/rsk.

BOARD'S EXHIBIT 9

Date 10/14/43—Witness —— ——

The May Department Stores Company
Famous-Barr Co.

Offices:
New York, 1440 Broadway
Paris, France

Offices:
London, England
Belfast, Ireland

Stores
St. Louis Cleveland Los Angeles
Denver Akron Baltimore

Executive Department

St. Louis, August 30, 1943.

U. S. Department of Labor, Wage and Hour and Public Contracts Division, Kansas City, Missouri.

GENTLEMEN:

We enclose herewith two National War Labor Board Form 10 applications for approval of a voluntary salary

adjustment at our store at Sixth and Olive Streets, our warehouse at Number 614 St. Charles Streets and our Patrons' Garage at Seventh and Walnut Streets, St. Louis, [fol. 188] Missouri, covered by one application, and at our Spring Avenue warehouse, covered by the other application.

The application which covers the employees at the store shows that we have Union contracts and working agreements which cover certain craftsmen, including electricians, painters, carpenters and plasterers. These employees, being covered by collective bargaining agreements, are excluded from this application.

The St. Louis Joint Council, United Retail, Wholesale and Department Store Employees of America, C. I. O., claims to represent the employees in the bushéling rooms of the store, Departments 280 and 281, amounting to approximately 40 employees out of the total of 4,530 employees of the store, and has been certified by the National Labor Relations Board, but we do not regard this as an appropriate unit and have consistently taken that position and have so notified all parties concerned. It is our intention to submit that question to the Courts, if and when the occasion arises. We have not recognized this Union and have not bargained with it for the employees in Departments 280 or 281 and no negotiations with that Union are pending. It is intended, however, that the employees in Departments 280 and 281 shall be included in this application.

We do not believe that any of the organizations named in the application, nor the organization named above, have any interest whatever in the enclosed application. However, if the organization named above should object to the inclusion of the employees of Departments 280 and 281 in the application, you are advised that said application may be considered as having been amended so as to exclude those employees from the application.

Very truly yours, The May Department Stores Company, by Fred Z. Saloman, Vice-Pres.

(follow 2 photolithographs, side folios 189-190, 191-192)

Board's Exhibit 9.

Form NWLB 10
(Rev. 1-43)

Bureau of Budget Requirement B-93—43
Approval Expires 6-30-43

NATIONAL WAR LABOR BOARD

(Regional Office)

This application is to be filed with the Wage and Hour and Public Contracts Divisions of the United States Department of Labor.

APPLICATION FOR APPROVAL OF A VOLUNTARY WAGE OR SALARY RATE ADJUSTMENT

DO NOT WRITE IN THIS SPACE
Application No. 7-6595
W & H Reference No. 3-44-12-29
Date Received W & H 4-30-43
W & H Office
Date Received NWLB

1. (a) The May Department Stores Co. (Name of employer) (b) St. Louis, Mo. (Main office address of employer) Garfield 8800 (Telephone Number)

(c) Address(es) of place(s) of business involved in this application Store at 6th & Olive Streets, St.Louis, Mo.; Warehouse at No. 614 St. Charles Sts., St. Louis, Mo.; and Patrons' Garage at 7th and Walnut Streets, St. Louis, Mo.

2. (a) Industry Department Store (Clothing, coal, transportation, etc.) (b) Type of establishment Retail (Factory, mine, wholesaler, retailer, etc.)

(c) Present products or services Dry Goods, Men's and Women's Clothing, Home Furnishings (Name the principal products made or handled, or service performed)

3. (a) Have the products made or handled, or the services performed by this establishment changed since January 1, 1941?.. Yes ☐ No ☒ (a)

(b) If answer to (a) is "Yes," give (1) the date change was made ..... and (2), the principal products handled or made, or services performed from January 1, 1941, to date of change .....

(c) Are any of the employees involved in the proposed adjustment now employed on any U. S. Government contracts?.. Yes ☐ No ☒ (c)

(d) If answer to (c) is "Yes," state (1) each Federal agency or branch of the Army, Navy, or Maritime Commission with which a contract is held ..... and (2), are any of these fixed-price contracts? ..... Yes ☐ No ☐ (d)

4. (a) Is application being made to National War Labor Board or Bureau of Internal Revenue concurrently with this application, for wage or salary adjustments for other employees in this or other places or business owned or operated by this employer? See statement attached Yes ☒ No ☐ (a)

(b) Has such an application previously been made to either agency? See statement attached Yes ☒ No ☐ (b)

(c) If the adjustment for which this application is made is approved, will approval be requested of the National War Labor Board or the Bureau of Internal Revenue for similar or other adjustments in this or other places of business owned or operated by this employer? ..... Yes ☐ No ☒ (c)

5. Will this adjustment be the basis of an application to the Office of Price Administration for an increase in the price ceiling of any commodity or service? ..... Yes ☐ No ☒ (5)
(If "Yes" is checked, application to the Office of Price Administration must be filed with that agency within 15 days after date of filing this application.)

6. (a) Total number of employees working in the place(s) of business involved in this application at the time of filing 4830

(b) Is the total number of employees now employed in all places of business of this employer more than 200? Yes ☒ No ☐

7. If the wage or salary rates now being paid to employees in any department(s) or place(s) of business of this employer have been negotiated with labor organizations, or if these wage or salary rates are now the subject of negotiation, enter the information requested below:

Department or Type of Employee	Name and Address of Labor Organizations With Which Negotiations are (or Have Been) Carried On
See Statement attached	

8. This application is the result of the action indicated below (check one, or specify in (d)):

(a) Voluntary adjustment by employer ..... ☒ (a)

(b) Agreement between employer and labor organization ..... ☐ (b)
(If possible, a copy of the agreement should be attached.)

(c) Arbitrator's or Referee's Award ..... ☐ (c)
(A copy of the award should be attached.)

(d) Other (specify) ..... ☐ (d)

9. Give a detailed statement of the amount or percent of the proposed adjustment(s) and the number of employees for each department, occupation or type of employee who will receive the adjustment(s). Include information on any proposed changes in piece-rate schedules or in other wage- or salary-rate schedules; changes in systems of automatic wage-rate increases based on length of service or merit; changes in bonus plans; and any other proposed changes which will affect the earnings of the employees .....
See statement attached

8. This application is the result of the action indicated below (check one, or specify in (d)):

(a) Voluntary adjustment by employer ..... ☒ (a)

(b) Agreement between employer and labor organization ..... ☐ (b)
(If possible, a copy of the agreement should be attached.)

(c) Arbitrator's or Referee's Award ..... ☐ (c)
(A copy of the award should be attached.)

(d) Other (specify) ..... ☐ (d)

9. Give a detailed statement of the amount or percent of the proposed adjustment(s) and the number of employees for each department, occupation or type of employee who will receive the adjustment(s). Include information on any proposed changes in piece-rate schedules or in other wage- or salary-rate schedules; changes in systems of automatic wage-rate increases based on length of service or merit; changes in bonus plans; and any other proposed changes which will affect the earnings of the employees

See statement attached

10. If this application is approved, as of what date will the proposed adjustment take effect? August 2, 1943
See Statement Attached

11. Which of the following is the reason for the proposed adjustment? (Check, or enter applicable items.)
The terms used below are explained in the National War Labor Board's Statement of Wage Stabilization Policy. (See Instruction II.)

(a) To adjust for (cost of living) MALADJUSTMENTS ..... ☐ (a)

(b) To adjust for INEQUALITIES AND GROSS INEQUITIES ..... ☒ (b)

(1) Within the applicant's place of business ..... ☒ (1)

(2) In relation to other comparable establishments or places of business ..... ☐ (2)

(c) To eliminate SUBSTANDARDS OF LIVING ..... ☐ (c)

(d) Other (explain the reasons fully) To maintain present payroll differentials ☒ (d)

IF THE PROPOSED ADJUSTMENT IS FOR THE PURPOSE OF CORRECTING *MALADJUSTMENTS* IN WAGE OR SALARY RATES, ANSWER ITEM 12 ONLY AND FILL IN ITEM 15

12. The information requested below in items 12 (b) and (c) is to be furnished for all employees in the place(s) of business involved in this application whose wage or salary rates are subject to the jurisdiction of the National War Labor Board. (Important: For exceptions see Instructions IV and V.)

(a) Describe the unit carefully if the information is not being furnished for all employees of one place of business:

189-190

1964

(b) Furnish the information requested below for all employees, or for the unit described in 12 (a) above, for (1) the pay-roll period ending nearest to January 15, 1941, and (2) the pay-roll period ending nearest to the date of this application.

For pay-roll period ending nearest to—	Pay-roll periods used		Total number employees on pay roll actually working	Total hours worked (see Instruction VII)	Total earnings at straight-time rates (see Instruction VII)	Average straight-time hourly earnings (Col. (6) ÷ Col. (5))
	From— Month Day Year	To— Month Day Year				
(1)	(2)	(3)	(4)	(5)	(6)	(7)
Jan. 15, 1941						
Date of application						

(c) With respect to the unit for which the adjustment is being sought, if any adjustment has been made in the wage or salary rate of 10 percent or more of the number of employees on the pay roll actually working during any pay-roll period since January 1, 1941, or in the period immediately preceding that date, fill in the form below. Use a separate line for each adjustment. Explanations similar to the following should be used in column 3: "Merit increases," "General increase," "Increase to bring wages in line with those paid in other plants," "Increases to comply with Federal (State) minimum wage laws," etc.

Department, occupation, or type of employee affected	Date of adjustment	Reason for adjustment	Amount of adjustment (cents per hour, or percent)	Number of employees directly affected by adjustment, at time of adjustment	Total number of employees on pay roll in the entire unit actually working at time of adjustment	For a pay-roll period immediately preceding the date of adjustment, furnish the following information for the employees affected by the adjustment (see Instruction VII): Total hours worked	Total earnings at straight-time rates	Average straight-time hourly earnings (Col. (7) ÷ Col. (6))
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)

IF THE PROPOSED ADJUSTMENT IS FOR THE PURPOSE OF CORRECTING *INEQUALITIES AND GROSS INEQUITIES*, ANSWER ITEMS 13 AND 14 ONLY, AND FILL IN ITEM 15. IF THE PROPOSED ADJUSTMENT IS FOR THE PURPOSE OF ELIMINATING *SUBSTANDARDS OF LIVING*, ANSWER ITEM 13 ONLY, AND FILL IN ITEM 15.

13. Enter on the form below, on a separate line for each job classification for which an adjustment is proposed, the information indicated.

Pay-roll period used: From ..... August (Month) 9 (Day) 1943 (Year) To ..... August (Month) 14 (Day) 1943 (Year)

Job classification: (Use descriptive titles, such as: typist, drill press operator, sewing machine operator, carpenter's helper, machinist, Class I, machinist Class II, etc.)	Number of employees who will be directly affected by the proposed adjustment	For a pay-roll period immediately preceding the date of application: Number of employees actually working	Range (if any) of straight-time wage or salary rates in present schedule: From— Dollars or cents	From— Per	To— Dollars or cents	To— Per	Total hours worked (See Instruction VII)	Total earnings at straight-time rates (See Instruction VII)	Average straight-time hourly earnings (Col. (9) ÷ Col. (8))
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
		SEE SCHEDULE ON STATEMENT ATTACHED							

14. (a) If the proposed adjustment is for the purpose of bringing into line wage or salary rates paid to the employees listed in item 13 with the wage or salary rates paid to other employees in the same establishment, explain the basis and necessity for such adjustment:

To eliminate substandards of living in the lower salary brackets and to maintain the present payroll differentials.

(b) If the proposed adjustment is for the purpose of adjusting wage or salary rates in order to bring them into line with the wage or salary rates paid for similar work in other establishments, give the names and address of such other establishments:

Name of Establishment	Address of Establishment

14. (a) If the proposed adjustment is for the purpose of bringing into line wage or salary rates paid to the employees listed in item 13 with the wage or salary rates paid to other employees in the same establishment, explain the basis and necessity for such adjustment:

To eliminate substandards of living in the lower salary brackets and to maintain the present payroll differentials.

(b) If the proposed adjustment is for the purpose of adjusting wage or salary rates in order to bring them into line with the wage or salary rates paid for similar work in other establishments, give the names and address of such other establishments:

NAME OF ESTABLISHMENT	ADDRESS OF ESTABLISHMENT

15. Signature of Applicants: This application should be signed by both the employer, or his representative, and an official of the labor organization if the application is the result of an agreement between an employer and a labor organization, or if it is the result of an arbitration or referee's award. Otherwise, this application is to be signed only by the employer or his representative.

For the employer Fred J. Peterson (Name of official) Vice Pres (Title) 8/30/43 (Date)

Labor Organization ..... Address .....

For the Labor Organization ..... (Name of official) ..... (Title) ..... (Date)

2.—(NWLB REGIONAL OFFICE COPY.)

U. S. GOVERNMENT PRINTING OFFICE 16—52550-2

[fol. 193] (BOARD'S EXHIBIT 9—Continued)

Statement Attached to Application of The May Department Stores Company for Approval of a Voluntary Salary Rate Adjustment to Employees at Its Store, St. Charles Street Warehouse and Patrons' Garage in St. Louis, Missouri.

4 (a). An application is being filed concurrently with this application for a similar salary increase to employees at the applicant's Spring Avenue warehouse and an application is being filed concurrently with this application with the Bureau of Internal Revenue for a similar increase to certain employees who are subject to the jurisdiction of the Bureau of Internal Revenue.

4 (b). The applicant has heretofore filed on Form NWLB 10 application for approval of a schedule and plan for individual merit increases, length of service increases and promotions and reclassifications and the same is now pending before the National War Labor Board, Regional Office at Kansas City, Missouri. The approval of the application to which this statement is attached should have the effect of increasing by $2.00 per week the maximum salary rate for each classification shown on the said schedule, to the extent that the position is subject to the jurisdiction of the National War Labor Board.

7. If the wage or salary rates now being paid to employees in any department(s) or place(s) of business of this employer have been negotiated with labor organizations, or if these wage or salary rates are now the subject of negotiation, enter the information requested below:

Department or Type of Employee	Names and Address of Labor Organization with which Negotiations are (or have been) Carried On
Electricians	International Brotherhood of Electrical Workers, Local Number 1 4245 Gibson Avenue St. Louis, Missouri
Carpenters, painters and plasterers	Verbal working arrangements with A. F. of L. Building Trades Councils, St. Louis, Missouri

[fol. 194] 9. Salary increases of $2.00 per week to all full time employees, and proportionate increases to all short

hour employees, who are subject to the jurisdiction of the National War Labor Board, except the aforementioned craftsmen who are covered by collective bargaining contracts or verbal working arrangements with their Unions.

10. The salary increase, if approved, will be paid to the employees within the classifications covered by the application who are on the employer's payroll on the date of approval of the application and will be retroactive to August 2, 1943 or to the date of employment of those employees employed after August 2, 1943.

[fol. 195]

Job Classification: (Use descriptive titles, such as: typist, drill press operator, sewing machine operator, carpenter's helper, machinist, Class I, machinist, Class II, etc.)	Number of employees who will be directly affected by the proposed adjustment	For a pay-roll period immediately preceding the date of application							
		Number of employees actually working	Range (if any) of straight-time wage or salary rates in present schedule —From— Dollars or Cents	Per	—To— Dollars or Cents	Per	Total Hours Worked See Instruction VII	Total Earnings at Str. time rates Inst. VIII	Average straight time hourly earnings Col. (9) ÷ Col. (8)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
Classification A	1313	1029	$16.00	wk.	$50.00	wk.	42329	$17657.46	41.72¢
" " B	1629	1387	16.00	wk.	60.00	wk.	58410	28340.36	48.52¢
" " D	68	54	12.00	wk.	19.00	wk.	1569	638.03	40.66¢
" " F	572	218	2.50	day	3.50	day	4788	1905.07	39.78¢
" " G	149	86	2.50	day	4.50	day	2740	1090.56	39.80¢
" " L	198	167	12.00	wk.	45.00	wk.	6982	4153.45	59.49¢
" " C	251	211	13.00	wk.	36.00	wk.	8513	3379.73	39.70¢
" " E	61	48	8.00	wk.	21.00	wk.	1295	497.93	38.44¢
" " M	15	4	2.33	day	3.00	day	167	65.00	38.92¢

[fol. 196] JOB CLASSIFICATIONS

"A". Full time salaried sales people on the Regular Pay Roll. All these employees receive commissions on sales in addition to salary and no change in commission rates is proposed.

NOTE: The full time work week of the employees covered by this application, with few exceptions, is forty-three and one-half hours.

Of the 1313 employees in this classification,

263 receive $16.00 per week
381 receive $17.00 per week
470 receive $18.00 per week
3 receive $18.50 per week
21 receive $19.00 per week
2 receive $19.50 per week
42 receive $20.00 per week
15 receive $21.00 per week
35 receive $22.00 per week
7 receive $22.50 per week
5 receive $23.00 per week
2 receive $23.50 per week
5 receive $24.00 per week
1 receives $24.50 per week
34 receive $25.00 per week
3 receive $26.00 per week
3 receive $27.00 per week
6 receive $27.50 per week
1 receives $29.00 per week
7 receive $30.00 per week
1 receives $32.00 per week
1 receives $32.50 per week
1 receives $34.50 per week
1 receives $35.00 per week
3 receive over $40.00 per week

[fol. 197] "B". Full time salaries non-selling employees on the Regular Pay-Roll in the main store building and St. Charles Street warehouse, except employees of Food Service Departments (see classification "C" below) and except maintenance electricians.

Of the 1629 employees in this classification,

227 receive $16.00 per week
1 receives $16.50 per week

237 receive $17.00 per week
10 receive $17.50 per week
259 receive $18.00 per week
14 receive $18.50 per week
90 receive $19.00 per week
148 receive $20.00 per week
4 receive $20.50 per week
55 receive $21.00 per week
6 receive $21.50 per week
155 receive $22.00 per week
19 receive $22.50 per week
38 receive $23.00 per week
18 receive $23.50 per week
57 receive $24.00 per week
3 receive $24.50 per week
90 receive $25.00 per week
1 receives $25.50 per week
25 receive $26.00 per week
9 receive $26.50 per week
15 receive $27.00 per week
16 receive $27.50 per week
14 receive $28.00 per week
10 receive $29.00 per week
1 receives $29.50 per week
18 receive $30.00 per week
2 receive $31.00 per week
2 receive $31.50 per week
2 receive $32.00 per week
2 receive $32.50 per week
5 receive $33.00 per week
1 receives $33.50 per week
6 receive $34.00 per week
[fol. 198] 12 receive $35.00 per week
5 receive $36.00 per week
4 receive $37.00 per week
1 receives $37.50 per week
2 receive $38.00 per week
2 receive $39.00 per week
4 receive $40.00 per week
29 receive more than $40.00 per week
10 receive $19.50 per week

"D". Short hour selling and non-selling employees on the Regular Pay-Roll, in the main store building and St.

Charles Street warehouse, except employees of Food Service Departments (see classification "E" below).

Of the 68 employees in this classification,

43 receive $12.00 for 30 hours per week
7 receive $13.00 for 30 hours per week
1 receives $13.50 for 30 hours per week
3 receive $14.00 for 30 hours per week
6 receive $14.00 for 36 hours per week
3 receive $15.00 for 36 hours per week
1 receives $15.50 for 30 hours per week
2 receive $16.00 for 30 hours per week
1 receives $18.50 for 30 hours per week
1 receives $19.00 for 30 hours per week

"F". Full time Regular extra sales people.

Of the 572 employees in this classification,

121 receive $2.50 per day
198 receive $2.75 per day
187 receive $3.00 per day
66 receive $3.50 per day

[fol. 199] "G". Full time Regular extra non-selling employees, in the main store building and St. Charles warehouse, except employees of Food Service Departments (see classification "H" below), and except carpenters, painters, plasterers and Class "A" electricians.

Of the 149 employees in this classification,

89 receive $2.50 per day
11 receive $2.75 per day
14 receive $3.00 per day
5 receive $3.25 per day
19 receive $3.50 per day
2 receive $3.75 per day
6 receive $4.00 per day
3 receive $4.50 per day

"L". Full time and short hour selling employees on the Regular Pay Roll who work on straight commission, and receive weekly drawing account.

"C". Full time employees in the Food Service Departments on the Regular Pay Roll. These employees receive three meals per day in addition to salary.

Of the 251 employees in this classification,

5 receive $13.00 per week
14 receive $13.50 per week
26 receive $14.00 per week
26 receive $14.50 per week
14 receive $15.00 per week
15 receive $15.50 per week
35 receive $16.00 per week
16 receive $16.50 per week
7 receive $17.00 per week
8 receive $17.50 per week
36 receive $18.00 per week
2 receive $18.50 per week
9 receive $19.00 per week
2 receive $19.50 per week
12 receive $20.00 per week
[fol. 200] 1 receives $20.50 per week
2 receive $21.00 per week
1 receives $21.50 per week
3 receive $22.00 per week
2 receive $22.50 per week
1 receives $24.00 per week
6 receive $25.00 per week
1 receives $29.00 per week
1 receives $30.00 per week
2 receive $32.00 per week
1 receives $33.00 per week
2 receive $34.00 per week
1 receives $36.00 per week

"E". Short hour employees in the Food Service Departments on the Regular Pay Roll. These employees receive meals in addition to salary.

Of the 61 employees in this classification,

11 receive $ 8.00 for 22½ hours per week
1 receives $ 8.50 for 22½ hours per week
1 receives $ 8.50 for 24½ hours per week
1 receives $ 9.00 for 22½ hours per week

29 receive	$ 9.50	for 27	hours per week
1 receives	$10.50	for 27	hours per week
2 receive	$10.50	for 30	hours per week
1 receives	$12.00	for 30	hours per week
4 receive	$12.00	for 37½	hours per week
1 receives	$12.00	for 39	hours per week
1 receives	$12.50	for 30	hours per week
1 receives	$13.50	for 27	hours per week
1 receives	$14.00	for 30	hours per week
1 receives	$14.50	for 37½	hours per week
1 receives	$18.00	for 24½	hours per week
2 receive	$18.00	for 30	hours per week
1 receives	$18.00	for 39	hours per week
1 receives	$21.00	for 36	hours per week

[fol. 201] "H". Full time Regular Extra employees in Food Service Departments. These employees receive three meals per day in addition to salary.

Of the 15 employees in this classification,

1 receives	$2.33	per day
9 receive	$2.50	per day
1 receives	$2.67	per day
4 receive	$3.00	per day

The applicant reserves the right to withdraw or amend this application at any time.

The May Department Stores Company, by Fred Z. Saloman, Vice Pres.

BOARD'S EXHIBIT 10

Bell Ringing.

Announcer: Good morning folks! Gather 'round for an important announcement!

Bell Ringing.

Announcer: This morning Mr. McCarthy has a message of vital interest to every member of the Famous Family! Listen closely * * * you won't want to miss one word! Mr. McCarthy * * *.

Good morning everybody * * * This is Wednesday, September first * * * a day I hope you will have reason to remember as a notable occasion. If the Government

grants the request we made yesterday, I know you *will* have good reason to recall it every week in the future. Now * * * this is the important news you are waiting to hear * * *.

Famous-Barr Company has filed with the proper Government Bureaus voluntary applications to grant a *two dollar* weekly salary increase to all full-time regular and extra employes, selling and non-selling, including salespeople on straight commission, and proportionate increases to all short-hour regular and extra employes in the store and warehouses, with the exception of executives receiving [fol. 202] over twenty-six hundred dollars per year, and a comparatively few employes whose salaries have been fixed by closed shop agreements.

As you know, the Government controls the salaries now being paid to employes. No general increases may be granted by an employer without Governmental approval. We have, we believe, presented a strong, forceful case. We have used every means at our command to convince the representatives of our Government that this increase is justified. We have every hope * * * every confidence, that our request will be granted, and we sincerely trust that we can bring to you, within the next few weeks the good news that the increase has been granted.

This general increase, of course, *cannot* be put into effect until approval of the Government is received, which is estimated to require about six to eight weeks, but we have requested that, if the increase is approved, it be made retroactive to August second, or to date of employment if after August second, and the accumulated amount of the increase will be paid in a lump sum to the employes who are on the payroll on the date of approval, as promptly thereafter as possible.

This increase, if granted, will have no effect on the year-end bonus we have been paying for the past few years, and will not affect the granting of individual increases for merit, re-classification or promotion.

In conclusion, we again want to thank you for your loyal and whole-hearted co-operation during these trying times. War-time conditions impose many new problems, cause many readjustments in your lives. Yet * * * as "Quartermasters" on the Home Front, you are carrying on in a manner typical of patriotic Americans since 1776. You are indeed to be congratulated.

We know you will be anxious to have these applications approved as soon as possible, and upon receipt of any information from time to time as to their progress through official channels, you will be informed by public address announcements or bulletins.

Thank you.

(Here follows 1 photograph, side folio 203)

Board's Exhibit 11.

STORE CHAT

By the employes, of the employes and for the employes of Famous-Barr Co.

Vol. VI—No. 43 September 3, 1943

Applications Filed With Government For Permission To Grant General Salary Increase

News Announced to Employees Over Public Address System Wednesday Morning

Store Chat Publishes Story for the Benefit of Those Who May Have Missed Broadcast

On Tuesday, August 31st, Famous-Barr Co. filed voluntary applications in the proper Government bureaus for permission to grant a salary increase of $2.00 per week to all full time regular and extra employees, selling and non-selling, including salespeople on straight commission, and proportionate increases to all short hour regular and extra employees. The only exceptions are executives receiving over $2,600 per year, and a comparatively few employees whose salaries have been fixed by closed shop agreements.

These applications for a general increase will have no bearing upon any future Year-End Payment.

The general increase cannot be put into effect until approval of the Government is received, which is estimated to require about six to eight weeks, but Famous-Barr Co. has requested that, if the increase is approved, it be made retroactive to August 2nd, or to the date of employment if after August 2nd, and the accumulated amount of the increase will be paid to the employees who are on the payroll on the date of approval, as promptly thereafter as possible.

You will be anxious to have these applications approved as soon as possible, and upon receipt of any information from time to time as to their progress through official channels, you will be informed by Public Address announcements or bulletin.

Bella Bernheim Leaves Estate of $20,000.00

Miss Bella Bernheim, Fitter in the Alteration Room, whose passing was noted in last week's Store Chat, left an estate of approximately $20,000, according to a will which has been filed leaving the bulk of her estate to her brother and the Jewish Orphan's Home. She also bequeathed all of her jewelry and clothing to Miss Jetta Kopf of the Alteration Room.

Miss Bernheim was known throughout the store for her warm-hearted generosity, and her will stands as a monument to her unselfish life. She lived wisely and invested her money well . . . so that others may now reap the benefits of her labors. There will be many who will remember Bella Bernheim in their prayers, for she lived so that others might know the good things of life.

* * *

Coralee Gets a Jolt

Anxious friends gaped with alarm

others might know the good things of life.

* * *

Coralee Gets a Jolt

Anxious friends gaped with alarm when little Coralee Shipp of the Adjustment Bureau staggered into the office on Monday, with an attack of what seemed to be the blind staggers. When pressed for the reason for this condition, she told a strange story which started with her admiration for Wild West moving pictures. After seeing her favorite Western heroine ride wildly through several films she visited a farm Sunday, mounted bareback on a horse, and gave him a sharp poke in the ribs. The next thing she knew she was seated on the hard ground and the horse was looking contemptuously at her from some distance away. "The movies were never like this," sighed our heroine.

You will be anxious to have these applications approved as soon as possible, and upon receipt of any information from time to time as to their progress through official channels, you will be informed by Public Address announcements or bulletin.

This Is the $65 Question

The Adjustment Dept. had a complaint about a pair of shoes bought from a Mr. Wolf. They could not locate the sale and upon getting in touch with the customer for more information, she asked . . . "Are there more Wolves in the Shoe Dept.?" . . . Our next remark would be censored!

* * *

Charlie Solomon Is Back

There was much rejoicing last Monday in the Men's Furnishing Dept., for Charlie Solomon, who has been out ill for the past eight weeks, was back with the gang again wearing his usual smile, but a trifle on the thin side.

Believe It or Not Dept.

Miss Ellen Howard of the Adjustment Bureau received a postcard from her cousin (it's always their cousins, somehow) in the army addressed to her in care of the "I Want My Money Back or Else, Department." Needless to say, it was delivered promptly.

* * *

Mrs. Nina Huck Thrilled

Mrs. Nina Huck, of the Bakery Dept., was very excited one day last week, for her son came in on a furlough from Mississippi and surprised her. We don't blame Nina for being so thrilled for she certainly has a fine son.

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[fol. 204] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 12840

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

MAY DEPARTMENT STORES COMPANY, Doing Business as Famous-Barr Company, Respondent

Appendix to Petitioner's Brief—Filed June 19, 1944

[File endorsement omitted.]

[fol. 1] BEFORE THE NATIONAL LABOR RELATIONS BOARD FOURTEENTH REGION

Case No. XIV-R-588

In the Matter of MAY DEPARTMENT STORES COMPANY, Doing Business as Famous-Barr Company, and St. Louis Joint Council, United Retail, Wholesale and Department Store Employees of America, CIO

Report of Proceedings

Room 1401, 14th Floor, International Bldg.,
St. Louis, Missouri,
Friday, May 7, 1943.

Pursuant to hearing, the above-entitled matter came on for hearing at 10:00 a. m.

Before Howard Myers, Trial Examiner

Appearances:

Ryburn L. Hackler, for the Board. Victor B. Harris, 1010 Pine Street, St. Louis, Mo., for the Petitioner. Milton H. Tucker and Robert T. Burch, 208 North Broadway, St. Louis, Mo., for the Company, Robert A. Wilson, for Joseph A. Padway, 736 Bowen Bldg., Washington, D. C., for American Federation of Labor, Intervener.

* * * * * * *

[fol. 2] FRANK VERBERDER (called by Respondent).

Direct examination.

By Mr. Harris:

Q. Since 1924, what has been the status of organization in the Busheling Room?

A. There has not been any organization.

Q. You are a member of the United Retail, Wholesale Department Store Employees of America?

A. I am.

Q. Are the other employees in the Busheling Room also members of that organization?

Trial Examnier Myers: When you say there has not been any organization in the Busheling Room since 1924, what do you mean, there was no contract with the company?

A. Yes, sir.

By Mr. Harris:

Q. Have you bargained with the company, has the Busheling Room ever bargained with the company since 1924?

[fol. 3] A. We have bargained with the company for ourselves but not under contract.

Q. Tell us how and under what circumstances you bargained with the company since 1924?

Trial Examiner Myers: And when?

A. I don't know the exact date in 1941, we bargained with our buyer for an increase.

By Mr. Harris:

Q. The employees in the Busheling Room?

A. That is right.

Q. Bargained with whom?

A. With our buyer, Mr. Koven.

Q. What did they bargain with him about?

A. For an increase.

Trial Examiner Myers: In wages?

A. That is right.

By Mr. Harris:

Q. When was that?

A. I can give the exact date in a second. We received the increase June 7, 1941.

Q. When did you bargain with Mr. Koven about it?
A. Before that, you mean?
Q. Yes.
A. I don't know exactly.

Trial Examiner Myers: Did it take a month or a day or a year?

A. I think it took about a week, I am not positive, approximately a week.

By Mr. Harris:

Q. Was this bargaining a short time before you got the increase?

A. That is right.

Q. Did you bargain, the Busheling Room Employees bargain with the company on any other occasion?

A. March 21, 1942, we received another increase, which we bargained for.

Q. Who did you bargain with that time?
A. The same Mr. Koven.
Q. What did you bargain about?
A. An increase in wages.
Q. You received the increase?
A. Yes, sir.

Trial Examiner Myers: All the employees in Department 280 received an increase?

A. Yes, sir.

Trial Examiner Myers: On June 7, 1941?

A. Yes, sir.

Trial Examiner Myers: And on March 21, 1942?

A. Yes, sir.

By Mr. Harris:

Q. Have there been any other occasions when the employees in the Busheling Room bargained with the employer about any other thing, wages or working conditions?

A. We did, but I don't remember the exact time.

[fol. 4] Q. Give your best recollection.

A. It is too long ago.

Trial Examiner Myers: Did you bargain for shorter hours?

A. We never bargained for shorter hours.

Trial Examiner Myers: Better working conditions?

A. We have asked for several things, improvements, just small things.

Trial Examiner Myers: What kind of improvements?

A. Well, for instance a fan, if it was too hot in one place we asked for a fan and got it there.

Trial Examiner Myers: With whom did you take that up?

A. Usually took it up with the foreman.

Trial Examiner Myers: With the wages, you usually took it with the buyers?

A. No, first asked our foreman.

Trial Examiner Myers: What is his name?

A. William Derreth. Both these times we naturally asked Mr. Derreth first and Mr. Derreth took it up with Mr. Koven.

By Mr. Harris:

Q. Then did you meet with Mr. Koven?

A. Then Mr. Koven called each one of us separately into his office.

Q. When you met with Mr. Derreth?

A. We met as a whole group, the whole department.

Q. The entire department met with him?

A. Yes, sir.

Q. What did you tell Mr. Derreth?

A. That we wanted an increase.

Q. What did he say?

A. He said he would take it up with Mr. Koven.

Q. And later Mr. Koven called each of you in separately?

A. Yes, sir.

Q. What did he say then, you had been granted the increase?

A. He already had the increase for each one made out and notified us of the increase.

Q. All he called you in for was to tell you what it was?

A. That is right.

* * * * * * *

Q. Now, are there any women left in the Busheling Department, Department 280?

A. Yes, sir.

Q. At the present time?

A. Yes, sir.

By Mr. Harris:

Q. A lady who was transferred from Department 280 to the basement, is that Department 281?

A. Yes, sir.

Q. Did she do the same kind of work down there she did in Department 280?

A. Yes, sir.

Q. Do you know whether anyone has ever been transferred in or out of Department 281 other than this one instance?

A. Not that I remember.

[fol. 5] Trial Examiner Myers: What about the four persons who were re-transferred back to your department, where did they come from, do you know?

A. One from the warehouse, two from the marking room —I beg pardon, one from the marking room, I don't where the other one came from.

Trial Examiner Myers: The other two?

A. Or rather the other two, I don't know where they came from. I beg pardon, one was from the Fur Room.

Trial Examiner Myers: When did that one from the marking room return?

A. When?

Trial Examiner Myers: Yes, approximately?

A. Several weeks ago, about three weeks ago.

Trial Examiner Myers: Is that the one you said was re-transferred about a month ago?

A. She was transferred out of our shop last September.

Trial Examiner Myers: Re-transferred.

A. About three weeks ago.

Trial Examiner Myers: Is that the one you said was re-transferred about a month ago, or this month, this last month?

A. This last month, yes.

Trial Examiner Myers: That is the one you are referring to?

A. That is right.

Trial Examiner Myers: What about the two who were re-transferred about three or four weeks ago, after they were transferred out of your department?

A. This one man was transferred back to our department about three or four weeks ago, after he was transferred out.

Trial Examiner Myers: Is that the man from the warehouse?

A. That is right.

Trial Examiner Myers: What about the other one from the marking room, when did that woman come back?

A. Well, only two of them went to the marking room, one did not come back.

Trial Examiner Myers: One came back?

A. The other one quit.

Trial Examiner Myers: When did the one come back, when did she come back?

A. I just said about last month, several weeks ago.

Trial Examiner Myers: What about the other one that came back again in three or four weeks, she was transferred, is she the one who quit?

A. No, she is still in the shop.

Trial Examiner Myers: You said two came back about three or four weeks ago?

A. After they were transferred out.

Trial Examiner Myers: That is one man?

A. That is right and the other one was just transferred here last month back.

Trial Examiner Myers: Listen to the question. Two [fol. 6] came back to your department about three or four weeks after they were transferred out, is that right?

A. That is right.

Trial Examiner Myers: One was a man that worked at the warehouse?

A. That is right.

Trial Examiner Myers: What did the woman do that came back three or four weeks after she was transferred?

A. I said I did not know. One worked in the fur room and the other one I did not know.

Trial Examiner Myers: Two persons came back three or four weeks after they were transferred, is that right?

A. Three altogether, two women and one man.

Trial Examiner Myers: One man worked at the warehouse?

A. Yes, sir.

Trial Examiner Myers: One worked in the marking room?

A. No, the one working in the marking room came back a year later.

Trial Examiner Myers: And one came from the fur department?

A. That is right.

Trial Examiner Myers: Where did the other one come from?

A. I don't know, I said I did not know.

* * * * * * *

Mr. Wilson: It is stipulated by and between the parties to this proceeding that the petition filed in Case No. XIV-R-508, Departments Nos. 280 and 281 were included in the unit as originally requested and as finally submitted to the Board, and as agreed to by the parties to that proceeding.

Trial Examiner Myers: Is it so stipulated, Mr. Harris?

Mr. Harris: Yes, sir.

Trial Examiner Myers: Mr. Tucker?

Mr. Tucker: Yes, sir.

Mr. Wilson: It is so stipulated.

* * * * * * *

Redirect examination.

* * * * * * *

By Mr. Harris:

Q. What was your understanding about the relationship between the St. Louis Joint Council and Local 372?

A. Well, I knew it was a part of the Joint Council.

Q. Local 372 is a part of the Joint Council?

A. That is right.

Q. It is your understanding that the Joint Council is authorized to bargain for any Local affiliated with it, including Local 372?

A. Yes.

[fol. 7] Q. Mr. Tucker asked you about what your opinion was as to the most desirable organization for the employees of Famous-Barr. You said it was to have all employees in one union.

A. Yes, sir.

Q. That is still your opinion, is it not?

A. It is.

Q. Is it also your opinion that the employees of the busheling room—that it would be more desirable for them to be bargained for separately than not to be bargained for at all?

A. At this time, yes.

Q. These women's coats you pressed, when was that?
A. When?
Q. Yes.
A. I think March 19 of this year.
Q. Of this year?
A. Yes, sir.
Q. That was after this petition was filed?
A. It was.
Q. In connection with arrangements which were granted after your discussion with the foremen upon these two occasions referred to, did you see most of the people go to Mr. Koven's office?
A. I did.

Trial Examiner Myers: How were you notified to go, or were granted after your discussion with the foremen upon these two occasions referred to, did you see most of the people go to Mr. Koven's office?
A. I did.
Trial Examiner Myers: Did he say "Now, you tell John Jones"?
A. That is right.
Trial Examiner Myers: And when John Jones was there, he sent him for Bill Smith? Is that right?
A. That is exactly right.

By Mr. Harris:

Q. And some other employee told you to go down, is that right?
A. That is right.
Q. You had been in Mr. Koven's office?
A. That is right.
Q. And he told you to tell someone else to come down?
A. Correct.
Q. Was that a continuous proceeding so far as you could observe?
A. Yes, sir.
Q. From your location there, were you in a position to see the people going down to Mr. Koven's office?
A. When I work, yes. They have to pass me there.

Trial Examiner Myers: That was true in June 1941?
A. Yes, sir.
Trial Examiner Myers: And in March 1942?

A. Yes, sir. It does not hold true now because some of the people are in the new shop. At that time they were all in the old shop.

[fol. 8] By Mr. Harris:

Q. Just so that we are clear on it, this one occasion you talked about when the women's coats were brought in for you to press, that was after this petition was filed?

A. Yes, sir.

Q. And until this petition was filed, there never were any women's clothes brought into your department for pressing or alteration?

A. No, sir.

* * * * * * *

Q. Now, when you saw these people, you say, go into Koven's department or office in connection with the raise they were supposed to be getting, how could you tell whether they were going into Koven's department or the rest room or some place else in the store?

A. When you work with a bunch of people that long and know their habits and when they pass you and give you the —well, the sign they are going down there, you know what they mean. Others again said "Well, I am going down to Koven's office."

Q. And everybody in the department said to you "I am going to Koven's office"?

A. That is right.

Q. Or gave you some kind of sign with their hand indicating they were going to Koven's office?

A. Yes, sir.

Q. And that is the way you knew they went to Koven's office?

A. That is the way I got my assumption.

* * * * * * *

Recross-examination.

By Mr. Hackler:

Q. Do you know how many people work in the second floor bushelmen's room, No. 280?

A. Twenty-seven.

Q. You testified you were the presser?

A. Yes, sir.

Q. Do you have any other pressers?

A. One.

Q. What is the nature of the duties of the other people up there?

A. You mean what they do?

Q. Yes.

A. Alter clothes.

Q. All of them do the same job?

A. No, various jobs.

Q. Can you go a little further into that?

A. Well, part of them mend or alter coats, and another part alter pants either by hand or by machine. Some we have go on the floor and fit clothes on the customers. That about takes care of it.

Trial Examiner Myers: What about the vest? A special group for vests?

A. We had one person who worked on vests, and sometimes two according to the amount of work.

Trial Examiner Myers: One full-time vestman, is that right?

A. Yes, sir.

[fol. 9] Trial Examiner Myers: And one who works on vests sometimes, is that right?

A. Yes, sir.

Trial Examiner Myers: That man who works on vests sometimes, when not working on vests what does he do?

A. On trousers and sometimes on coats. Wherever they are needed the most.

By Mr. Hackler:

Q. Do you have any rippers?

A. Yes, one.

Q. Are you familiar with Department 281? Do you know what type of operations are performed?

A. About the same.

Q. How many people work there?

A. Three, two women and one man.

Trial Examiner Myers: In Department 281?

A. In No. 281.

By Mr. Hackler:

Q. I believe you testified you had a foreman named——
A. William Derreth.
Q. Is there a foreman in No. 281 also?
A. Mr. Webber.
Q. To whom is Mr. Derreth responsible, or do you know?
A. Mr. Koven.
Q. Who is Mr. Koven?
A. Buyer in Men's Clothing.
Q. To whom—under whom is Mr. Koven?
A. Mr. Loeb, the buyer in the Men's Clothing, in the basement.
Q. I believe you testified as to the number of hours you worked. Are you familiar with the amount of compensation the people in your department earn?
A. I am.
Q. Can you tell me what range there is there from the lowest to the highest?
A. Yes. You mean men and women together or separately?
Q. Divide it any way you want to. I just want a factual picture of how people in your department are paid.
A. Men are paid from $31.00 to $40.00.
Q. From $31.00 to $40.00?
A. Yes, sir.

Trial Examiner Myers: A week?
A. Yes, sir.
Trial Examiner Myers: Paid on a weekly basis?
A. Yes, sir.

By Mr. Hackler:

Q. How are women paid?
A. From $20.00 to $26.00.
Q. Are you familiar with the amounts of pay in Department 281, in the basement?
A. Yes, sir. $23.00 for the two women. I don't know about the man.
Q. Do any of the bushelmen work on a commission or any such basis?
A. No, sir.

[fol. 10] HENRY SCHEREN (called by the Union).

. . . . . .

Direct examination.

. . . . . .

Q. Were you a member prior to that?

A. I was a member of the Amalgamated Clothing Workers—or a member of the Journeymen Tailors Union before we amalgamated with the other organization in 1919.

Q. What was the Journeyman Tailors Union?

A. It was Local No. 11, Journeyman Tailors Union of America. We had our International at that time. The membership that we had was such as custom tailors, merchant tailors, and we also had retail stores, department stores, bushelmen in the retail stores and department stores at that time.

Q. With what organization was the Journeyman Tailors Union affiliated?

A. The American Federation of Labor at that time.

Trial Examiner Myers: What time was that?

A. That was back—we were members of the American Federation of Labor up until the merger with the Amalgamated Clothing Workers back in 1935 or 1936.

Trial Examiner Myers: How long were you with the Journeymen?

A. I have been a member of the organization since 1919.

By Mr. Harris:

Q. You were a member of what Local?

A. Local No. 11.

Q. Of the Journeyman Tailors?

A. Journeyman Tailors.

Q. Is that located in St. Louis?

A. That is located in St. Louis.

Q. Is the Local still in existence?

A. The Local is still in existence either under the Amalgamated Clothing Workers or the Journeyman Tailors.

Q. Do you operate under that name?

A. We operate under "J. T., A. C. W. A." It is still a branch under the Amalgamated Clothing Workers.

Q. What do those mean, those letters you mentioned?

A. Journeyman Tailors, J. T. U., the Journeyman Tailors Union. The A. C. W. A. is the Amalgamated Clothing Workers of America.

Q. Do you have a label?

A. Yes, sir.

Q. Does your label have those letters on it?

A. The label for No. 11 union is a customs label. It reads [fol. 11] across the label "Custom Made Clothes." Various other locals affiliated with the Amalgamated have different labels. That is the wording, Amalgamated Clothing Workers.

Q. Is that label still in use?

A. Yes, sir.

Q. By Local No. 11?

A. Yes, sir.

Q. Is that the same label they used back in 1919?

A. Yes, sir.

Q. And you are still using it?

A. Yes, sir, still using it.

Q. When the Journeyman Tailors merged with the Amalgamated Clothing Workers, with what organization was the Amalgamated affiliated at that time, or was it affiliated?

A. Now, just—yes, I believe they were also affiliated with the American Federation of Labor at that time.

Trial Examiner Myers: When did the Journeyman Tailors become affiliated with the Amalgamated?

A. About 1935 or 1936.

Trial Examiner Myers: And prior to that, were the Journeyman affiliated with the American Federation of Labor?

A. Yes, sir.

Trial Examiner Myers: And between 1919 and 1935 the Journeyman were affiliated with the American Federation of Labor, is that right?

A. Yes, sir.

Trial Examiner Myers: Then the Journeyman became affiliated with the Amalgamated?

A. They merged with the Amalgamated Clothing Workers.

Trial Examiner Myers: In 1935 the Amalgamated Clothing Workers were affiliated with the American Federation of Labor, or was it an independent?

A. They were affiliated with the American Federation of Labor, and when those nine International Locals formed

the CIO the Amalgamated Workers was one of the nine. Naturally we were merged with the Amalgamated at that time, and that is how we became CIO also at that time.

By Mr. Harris:

Q. What was the jurisdiction of the Journeyman Tailors Union Local 11? Tell us who you had organized, if you did have anybody organized at all in 1919.

A. In 1919? Well, the Journeyman Tailors at that time in 1919—we had our own International at that time affiliated with the American Federation of Labor. The International Ladies Garment Workers were also affiliated with the American Federation of Labor, and the United Garment Workers were also affiliated with the American Federation of Labor. The jurisdiction we had at that time in Local No. 11 was the merchant tailors association——

[fol. 12] Trial Examiner Myers: Now, go slow.

A. The bushelmen in the retail stores, the bushelmen in the department stores, and then we had a lot of small tailors scattered over the city that had some special work on men's clo-hing.

Trial Examiner Myers: And all of these were located in the City of St. Louis, is that right?

A. Yes, sir.

Trial Examiner Myers: The Merchant Tailors Association, the bushelmen in the retail stores of St. Louis——

A. Yes, sir.

Trial Examiner Myers: And bushelmen in the department stores of St. Louis?

A. Yes, sir.

Trial Examiner Myers: And small tailors located in the City of St. Louis?

A. Yes, sir.

Trial Examiner Myers: That does not mean you had all of the tailors, does it?

A. Well, not necessarily. There may have been a few of the shops not organized.

Trial Examiner Myers: Did you have all department stores?

A. Yes, sir.

Trial Examiner Myers: For the bushelmen?

A. Yes, sir.

Trial Examiner Myers: And you had all retail store bushelmen of all retail stores in St. Louis?

A. Yes, sir.

Trial Examiner Myers: And did you have all the members of the Merchant Tailors Association organized also?

A. Yes, sir.

Trial Examiner Myers: That is, the bushelmen of these?

A. Yes, sir, bushelmen, coatmakers, pantsmakers and so on all under one Local.

By Mr. Harris:

Q. Is that the general organizational setup of the Journeymen Tailors in other parts of the United States as well as St. Louis?

A. That setup was all over the country, in other parts of the United States.

Q. Your affiliation with the Amalgamated, was that nationally or locally?

A. That was nationally.

Q. Are you familiar with what happened in the department stores in regard to journeymen tailors in 1920?

A. When I became a member of the organization in 1919, then the bushelmen were members of the organization, Local 11. They did not have any separate local. They were members of our local but they met separately and it came about in 1920 they had a controversy at that time for an increase in wages.

Trial Examiner Myers: With whom was the controversy?

A. With the retail stores.

Trial Examiner Myers: You mean the bushelmen?

A. The bushelmen in retail stores and department stores.

[fol. 13] By Mr. Harris:

Q. Did you have all or most all of the retail and department stores organized, the bushelmen?

A. We practically had every one of them in the union at that time.

Q. Was the May Company organized at that time?

A. Yes, sir.

Q. The bushelmen of the May Company?

A. Yes, and naturally when it came down, when they asked for the increase they had this controversy and could

not get together somehow or another and had a strike and they struck back in 1920 and the organization lost that strike.

Q. Who struck?

A. Local 11, the bushelmen did.

Q. The people employed as bushelmen?

A. That is right.

Q. What happened?

A. The strike was lost, since that time we have not been able to make any inroads in these stores with the exception since 1936 or 1937 we have been fortunate enough to get some of these stores back in our organization, such as Bonds, Werner and Hillton, Frank Hillton, Roberts, Taylor and Windsor Tailoring, there is five stores we have under contract.

Q. What kind of stores are they?

A. Those are retail stores, busheling departments.

Trial Examiner Myers. Mainly men's clothes?

A. Yes, sir.

Trial Examiner Myers. In 1920 who struck?

A. The Local itself, Local 11, the Bushelmen of Local 11.

Trial Examiner Myers. Only the bushelmen?

A. Yes, sir.

Trial Examiner Myers. Did the other members of Local 11 go out on strike?

A. The other members, their agreement expired at some other date and they were working.

By Mr. Harris.

Q. These present stores you have described are all located in St. Louis?

A. Yes, sir.

Q. You have organized the bushelmen's rooms?

A. Yes, sir.

Q. Busheling rooms only?

A. That is right.

Trial Examiner Myers. Wait, did the bushelmen of Local 11 have a separate contract with the department stores?

A. Yes, they had their own contract with the department stores and the retail stores. Then we had contracts with the Merchant Tailors Association, also had bushelmen working there but they came under the jurisdiction of *of* that contract.

Trial Examiner Myers. As I understand it, the retail stores, the department stores, the bushelmen of the retail [fol. 14] stores and the department stores had separate contracts?

A. Yes, sir.

Trial Examiner Myers. Separate and apart from other members of Local 11?

A. That is right.

By Mr. Harris:

Q. Those agreements are with the Amalgamated Clothing Workers?

A. Now, you mean?

Q. Yes.

A. That is right.

Q. The present agreement you are referring to?

A. That is the Amalgamated Clothing Workers.

Q. Do you have agreements or understandings with any of the busheling rooms or busheling room employees in any department store in St. Louis at the present time?

A. I have no agreements but I do have good relationship with Mr. Hessee, at Scruggs.

Q. What is the name of Scruggs?

A. Scruggs, Vandervort and Barney.

Q. What is it?

A. The Alteration Department.

Q. What is Scruggs, Vandevoort and Barney?

A. A department store.

Q. Similar to Famous-Barr?

A. Yes, sir.

Q. What is your relationship there?

A. We haven't got a whole lot of members there, but the members I have got I can go and see Mr. Hesse and take up complaints and things that arise in the shop.

Q. You bargain for your members in the busheling room of Scruggs, Vandevoort and Barney?

A. Yes, sir.

Q. Are you familiar with the type of work done in busheling rooms?

A. Yes, sir.

Q. Is that considered a craft?

A. Well, in the men's department I consider that a more skilled profession because, after all, it is a trade and in order

to be a bushelmen you have to be a tailor. In order to be a tailor you put in many a year in order to learn that trade and as far as the ladies' work, I would say that there are some borderline cases but by and large it is not true. That department is a separate department.

Q. You mean there may be borderline cases between the ladies' tailoring and the men's tailoring?

A. Yes, sir.

Q. By and large they are separate distinctions?

A. That is right.

Q. Does it require many years of training and skill to become a tailor or bushelman?

A. It does.

[fol. 15] Q. Is a tailor or bushelman who works on men's clothing, does it qualify him to work on women's dresses?

A. No, not necessarily, that is a different line of work.

Q. Generally speaking, is the working on men's clothing altogether different from working on women's clothing?

A. It is different.

Q. When you spoke of borderline cases, what did you mean?

A. In the line of borderline cases I speak of as exceptional cases, nowadays the ladies buy like coats and skirts, naturally you have to be a tailor to make that but in the line of dresses it is altogether different.

Trial Examiner Myers. What about slacks?

A. Slacks, no, tailors don't bother with slacks.

Trial Examiner Myers: A tailor working on men's coats could also work on women's coats, if he could do one he could do the other?

A. You mean in the line of coats?

Q. Yes.

A. Yes, that is right.

Q. But he would not be able to work on women's dresses?

A. No, not necessarily. He would have a good idea, probably could break himself into it but would have to put in some time learning it.

Q. Did your contracts in the past with busheling rooms and your present contract take in everyone in the busheling room, pressers and everybody else?

A. Yes, sir.

Q. Do you have a regular—at the present time do you have a regular wage scale for busheling rooms, a standard wage scale?

A. We have a standard wage scale for bushelmen in all retail stores, we have also the merchant tailors, the stores we have mentioned.

Q. In the contract you have in St. Louis at the present time in busheling rooms, do you include any one else in the store except the bushelmen?

A. The only ones we include in that work are in the alteration room, that includes first class tailors, bushelmen, finishers on pants, on vests and pants, and then we have special machine operators, and we have finishers and pressers.

Trial Examiner Myers. What about the man who fits the clothes for the customer on the floor?

A. Fitters and markers are also included.

Trial Examiner Myers. And rippers?

A. Fitters and markers are rippers.

[fol. 16] Cross-examination.

By Mr. Tucker:

Q. Has your lodge or your local union of the Amalgamated any members in Scruggs Women's Alteration Department?

A. No, sir.

Q. Are you sure about that?

A. I am sure about that.

Q. Do I understand your constitution of the Amalgamated would permit you to take in sales people who sell clothes, is that right?

A. Yes, sir.

Q. You testified that your Amalgamated Association is more or less in the men's clothing industry, those were your words?

A. Yes, sir.

Q. Now, what do you mean by that, that you specialize in organizing the men's clothing end of the garment industry?

A. Well, ninety-five percent of the men's clothing in the line of suits is organized by the Amalgamated Clothing Workers. We have cotton industries also that come under the jurisdiction of the Amalgamated, such as shirts, neck-

wear, robes, that comes under the jurisdiction of the Amalgamated.

Trial Examiner Myers. Men's robes?

A. Yes, sir.

Trial Examiner Myers: Bath robes?

A. Yes, sir.

Trial Examiner Myers. Gloves?

A. Gloves.

Trial Examiner Myers. Men's wearing apparel?

A. That is right.

By Mr. Tucker:

Q. Is it a fair statement of your testimony and your intentions to say that the Amalgamated specialized on men's clothing workers and the International Ladies Garment Workers Union specialized on ladies' garment workers?

A. That is right.

Q. And the Ladies Garment Workers work on lighter materials in general than the men's garment workers, the men's garment workers work on wool and heavier fabrics?

A. Yes, sir.

Q. Do you admit the membership, and have in your organization people who work on women's garments, is that correct?

A. Women's garments?

Q. Yes.

A. Well, offhand I cannot recall of any except maybe gloves or something like that, robes.

Q. Don't your members work on women's dresses or manufacture women's dresses?

A. No, sir.

Q. Women's coats?

A. No, sir.

[fol. 17] Trial Examiner Myers: They might under a government contract for the people in the armed forces?

A. Naturally under the armed forces they make a lot of uniforms and different things like that but the International Ladies Garment Workers are the ones do most of that work.

* * * * * * *

Q. Do you know whether or not there was a regular contract at that time?

A. There was a written contract.

Q. With the Famous & Barr?

A. With Famous & Barr.

Q. Are you sure whether that was with Famous & Barr or the Retail Merchants Association?

A. I don't know, they signed it, I don't know whether the Retail Association, but I believe Mr. Salomon had his signature on it.

Q. Did you see the contract?

A. At least that is who they were negotiating with at that time. I was not active in the organization at that time but I know the business agent that was, they were negotiating with Mr. Salomon during those days.

Q. The business agent told you he was negotiating with Mr. Salomon?

A. That is right.

Q. Who is the business agent?

A. A fellow named Frank Petera, he passed out.

Q. The Salomon you refer to is the general manager of Famous & Barr, is that the Salomon you are referring to?

A. Yes, sir.

Q. But you don't know of your own knowledge whether the contract, that there was a separate contract with each department store in town, or whether they were all on one contract with the Local?

A. I don't know, I could not say whether the Association signed the contract or each store had a separate contract, maybe the Association signed the one contract for all stores.

Q. Your impression was though whatever the contract form was that Mr. Salomon was doing the negotiating for the retail people with the Amalgamated or with the Journeymen Tailors Union, is that right?

A. That is right.

Q. Now, is Scruggs' operation on the alteration of men's and women's garments substantially the same as it is at Famous & Barr and other retail stores?

A. Evidently it is, I could not say offhand how Scruggs' Ladies' Department works, whether they handle the same kind of—whether they have dresses or what that depart-

ment works on, I know that the men's department works on practically men's wear, such as coats, vests and pants. [fol. 18] Q. The scale required for persons in the bushelmen's department, or women's altefation department in any department store would be about the same in one store as another, wouldn't it?

A. Evidently it would.

Q. That would be your judgment?

A. That would be my judgment, yes.

Q. Would a competent man, an alteration employee or bushelman be able, with very little be shown as to the details, be able to do the work in the women's alteration department on woolen garments?

A. On woolen garments?

Q. Yes.

A. Such as coats and——

Q. Yes.

A. Well, I would say if a bushelman works on men's clothing and is put in the ladies' work it would take a little while for him to get his hands worked into it. It is somewhat different than men's coats.

Q. The fabric is different?

A. The make is different.

Q. There would not be anything he could not pick up pretty quick if he was a confident tailor?

A. If a competent tailor it would take a while, finally he would get on to the work.

Trial Examiner Myers: The coats button differently?

A. They button different and they are made different, a man's coat is made different than a ladies' coat.

Q. As far as outside sewing or cutting it is concerned, it takes the same operations.

A. There are several different operations in a lady's coat than a man's coat.

Q. Is it more difficult, does it require more skill to be a successful alterater in a women's alteration department than it does in a man's busheling department?

A. Not necessarily.

Q. Or vice versa?

A. I would say in the men's department it requires more skill.

Q. But a woman who is competent in the alteration of women's clothes, could, without very much trouble, go over

to the men's department and if the supervisor told her what to do, she could do it, couldn't she?

A. I don't say that, it depends on the work she was given to do. You take a lady who works in the ladies' department, you cannot send the lady in the men's department and tell her to raise the shoulders on a coat or shorten the collar or take the sleeves out and bushel the coat. She probably could do such things as finishing and different things but she would not be able to do the alteration, it is different.

Q. If the manager of this men's alteration or busheling department shows her what he wanted done and how to do it once, could she go on and do it after that?

A. It depends on what alteration he is going to show her today.

[fol. 19] Q. I am talking about the ordinary alteration.

A. She could not do all of it.

Q. Could she do any of the work in the men's department?

A. She could do the lining, finishing, that is about all she could do, such as finishing a coat or finishing after the tailor makes the alterations, sews it up and she finishes the lining, sews the lining in, maybe take a pair of pants up in the back, but to make alterations, they could not do it.

Q. Don't they have shoulder and collar operations on women's garments?

A. Yes, they do have on coats, but there are no women do it, men tailors do.

Q. Maybe that is what confused you or me, or both of us. When I talked about people working in the women's alteration department, I am not making a distinction between women and men but taking it for granted there are men and women working in the women's alteration department and men and women working in the men's busheling room.

A. That is right.

Q. I am assuming that a competent alteration employee in the women's alteration department and he is transferred to the men's busheling room, could he go ahead and perform the labor in the busheling department satisfactorily?

A. That may be like I stated before, a borderline case. Probably where a man is working in the ladies' department and is a tailor and is sent into the men's department, he can do that work.

Q. Don't they have tailors in the women's alteration department?

A. We don't consider them tailors, such as dresses——

Q. I am talking about women's suits and coats.

A. If you have suits and coats in a ladies department you have to have tailors to do it.

Q. And the tailors would have to make alterations in the women's department, could he make those in the men's busheling department?

A. That is true.

Q. The Amalgamated does admit women's alteration department employees to its union, doesn't it?

A. We haven't got any.

Q. I mean if there is a woman, maybe the question was not clear, if the women are employed?

Trial Examiner Myers: Instead of saying women and men, if you will say male and female.

By Mr. Tucker:

Q. If there is a female bushelman in the busheling department would she be eligible to belong to your union?

A. Working in the men's department?

[fol. 20] Q. Yes.

A. Sure.

Q. You take them into your local the same as you do men?

A. That is right.

Q. In any of the local stores you have mentioned, the five stores where you have contracts, do you know whether or not your union has attempted to secure members outside of the busheling room in that store or any of those stores?

A. No, we have not tried to secure any members outside of the alteration department.

Q. That is the busheling room?

A. That is right.

Redirect examination.

By Mr. Harris:

Q. When you referred to the various articles of clothing manufactured by members of the Amalgamated, such as

gloves, shirts, and so on, you were referring to manufacturers and not the selling end of such products?

A. No, just the manufacturer.

Q. Is the International Ladies Garments Workers we have been referring to affiliated with the American Federation of Labor?

A. Yes, sir.

Q. Do you know what the jurisdiction of that union is, whether it is limited to women's clothing?

A. Yes, I think that is what it is limited to.

Q. I asked if you know that?

A. Yes.

Mr. Tucker: I think we can get it clear here, we have the Constitution of the International Ladies Garment Workers Union which can be read into the record.

Trial Examiner Myers: Go ahead.

Mr. Harris: This is bulky and I will have to read it, I borrowed it. This is Article 1, Section 2:

"The jurisdiction of the I. L. G. W. U., shall extend to all branches of the ladies' garment industry in the United States and Canada, such as cloaks, suits, skirts, dresses, waists, wrappers, corsets, underwear, articles of children's wear, bath robes, and so forth, and to all work and processes con-ected with the production of such garments."

* * * * * * *

By Mr. Harris:

Q. Mr. Tucker asked you about the scale of various employees in bushel room in department stores, you said it would be relatively the same, in your judgment, the scale of bushel room employees in retail stores or department stores would be the same, in your judgment?

A. That is right.

[fol. 21] Q. Tell briefly the difference the construction of women's and men's clothes.

A. Construction of the coat.

Q. Where you said there was a difference in construction, if you would work on one it would take at least a little practice even for an expert tailor to work on the other?

A. The coat is cut different and the foundation is different. There are a lot of different cuts in the coat, when you get to them you have to know how to do it. That is the

difference between a lady's coat and a man's coat. They have a bigger chest than a man's coat has.

Mr. Harris. That is all.

Mr. Tucker. I have a question or two.

Recross examination.

By Mr. Tucker:

Q. The difference you mentioned between men's and women's operations is a good deal more important than the manufacture of a man's coat or a woman's coat than it is in the alteration, isn't it?

A. In the manufacture there is a difference too, but in the alteration of the man's coat and the lady's coat there is a difference also.

Q. You referred to the fact they are cut different and makes it more complicated to do the alteration, somebody marks a place where the change in the coat is to be made.

A. Yes, they have a marker but they still have to do it.

Q. But the cut is made on the line made by somebody else?

A. Not by the line, the marker makes a line, they reach in and mark it over.

Q. It is not nearly as complicated as where you are cutting a new garment?

A. That is right.

Q. There is not nearly so much difference between the work on men's and women's coat in the alternation in them as there is in the manufacture?

A. That is right.

Q. Now then, at the time the bushelmen were organized in the department stores and the men's stores in St. Louis and in 1919 and 1920, do I understand there was only one local union representing all the workers in these different stores?

A. There was one local union.

Q. Only one?

A. Only one.

Q. And it represented all the different stores?

A. All the different stores.

Q. Now, you referred to negotiations with Mr. Hesse, as a matter of fact you don't have a majority in Mr. Hesses's department?

A. No, sir.

Q. You have some members there?
A. Yes, sir.
[fol. 22] Q. And whenever one of your members has a grievance you feel at liberty to go in and talk to Mr. Hesse about it and he straightens it out for you?
A. Yes, sir.
Q. You don't indulge in collective bargaining?
A. We have no agreement there and it is a matter of good relationship.
Q. For each individual?
A. For each individual we have there.
Q. You don't bargain for anybody, anybody you don't represent or the rest of the busheling department?
A. No, sir.

NONA G. WHITE (called by the Union).

Direct examination:

Trial Examiner Myers: What is your name?
Q. Nona G. White.
Trial Examiner Myers: Miss or Mrs.?
A. Miss.
Trial Examiner Myers: Where do you live, Miss White?
A. At the present time at the Mayfair Hotel.
Trial Examiner Myers: In St. Louis?
A. Yes, sir.
Trial Examiner Myers: Proceed, Mr. Harris.

By Mr. Harris:

Q. What is your occupation?
A. General organizer.
Q. For whom?
A. The Retail Clerks, International Protective Association.
Q. That is affiliated with what organization?
A. The American Federation of Labor.
Q. Have you been active in the efforts of that organization at Famous & Barr Company?
A. Yes, sir.
Q. How long have you been active?
A. Six months.
Q. You have been active in that six months?

A. Yes, sir.

Q. How long have you held your present position?

A. Approximately three years.

Q. How long?

A. Approximately three years.

Q. Are you familiar with the type of organization which your union is seeking to set up at Famous & Barr?

A. What do you mean by that?

Q. Do you know what type of organization you are trying to form at Famous & Barr?

A. Certainly.

Q. Will you tell us what that is?

A. We are trying to organize the Famous-Barr Company.

Q. Into what union?

A. Into the A. F. of L., Department Store Employees Union.

[fol. 23] Q. Are you trying to organize any of the employees in any other A. F. of L. Union?

A. We are organizing all the employees we can.

Q. What union are you trying to get the employees to join?

A. Sir?

Q. What union are you trying to get the employees to join?

A. We are trying to get them to organize into the A. F. of L., Department Store Employees Union.

Q. Are you trying to get them to join any other A. F. of L. Union?

A. No, sir.

Q. Your union is the only one you are asking that they join?

A. Yes, the A. F. of L. Department Store Employees Union.

* * * * * * *

Q. Does the American Federation of Labor or any affiliated union have any contract with the Famous-Barr at the present time?

A. I think through some affiliated unions.

Q. What are they?

A. I could not name them.

Q. Do you know any?

A. The teamsters is one, the electricians, perhaps the painters.

Trial Examiner Myers: If you are not sure, don't answer.

A. I could not prove it, I have never seen the contracts, only heard that but I could not prove it. I have not seen the contracts.

By Mr. Harris:

Q. Is that your understanding?

A. Yes, as I said I have heard it but I don't know.

. . . . . .

Q. Do you know whether the teamsters represent anybody else in the store other than the delivery people?

A. I could not say.

Q. Are you trying to organize any of the people connected with the delivery department?

A. We are trying to organize the entire store.

Trial Examiner Myers: What do you mean by the store?

A. All the people working in the store.

Trial Examiner Myers: What about the Pine Street Warehouse?

A. We are not talking about that, we are talking about the store.

Q. Just the department store?

A. Yes, sir.

Q. You are not trying to organize the warehouse?

A. No, if the employees go through the store we are trying to organize the department store.

Q. They have a warehouse known as St. Charles Street Warehouse?

A. Yes, sir.

[fol. 24] Q. You know about that?

A. Yes, sir.

Q. Are you trying to organize any of those employees?

A. Yes, sir.

Q. What about the Pine Street Warehouse?

A. I think the teamsters have already organized that.

Q. That is only down a few blocks?

A. I am not familiar with all the streets, I don't know whether it is or not. The Pine Street Warehouse, you can ask the counsel whether the teamsters represent the employees there.

By Mr. Harris:

Q. I am asking you whether you are trying to organize the people employed at the Pine Street Warehouse?

A. No, I dont think so.

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ELMER P. THEISS (called by the Union).

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Direct examination.

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By Mr. Harris:

Q. State your occupation, please.

A. General representative, American Federation of Labor.

Q. Describe your duties briefly to us.

A. My duties are to represent some one hundred and twelve International Unions affiliated with the American Federation of Labor, and to conduct and care for the business of the American Federation of Labor in the midwest part of the United States of America.

Q. One of the unions you represent is the Retail Clerks?

A. It is.

Q. What is the correct name of that organization?

A. Retail Clerks Protective International Association—International Assoeiation of Retail Clerks, I believe is the correct name. I would have to check the title.

Q. That is approximately correct?

A. Yes, sir.

Q. Is that the organization, the union, which is seeking to organize employees of Famous-Barr?

A. That is the International Union that will probably take jurisdiction over the larger part of the employees employed by the Famous-Barr Company.

Q. What union is trying to organize the employees of Famous-Barr?

A. The American Federation of Labor and its affiliated International Unions in one combined body.

Q. Does that mean all unions affiliated with the American Federation of Labor?

A. If there were employees there that came under their jurisdiction, that would be so.

[fol. 25] Q. So that it is not accurate to say that the Retail Clerks Protective Association is seeking to organize employees of Famous-Barr?

A. We are seeking to organize the selling and nonselling employees of Famous-Barr Company, and naturally they would come under the jurisdiction of the Retail Clerks International Union.

Q. The Retail Clerks is merely one of the Unions seeking to organize the employees of Famous-Barr?

A. They are only one of the International Unions that might have members in the Famous-Barr Store.

Q. Is my statement correct, that the organizing of Famous-Barr is not limited to efforts of the Retail Clerks Union?

A. It is so far.

Q. Then, I am a little confused as to whether or not the American Federation of Labor and all of its affiliated unions are seeking to organize Famous-Barr or merely the Retail Clerk's Union of the American Federation of Labor.

A. The American Federation of Labor and its affiliated International Unions are seeking to organize these employees under my direction. I am representing one hundred and twelve International Unions, and if I found employees that came under the rightful jurisdiction of an international union I would recognize it and give them to that international union, except I might work out an understanding whereby I might pass up the jurisdiction of an existing international union and place them in one organization for bargaining purposes. That would depend entirely upon the circumstances.

Trial Examiner Myers: Who do you include in the selling and nonselling employees of Famous-Barr, what categories?

A. That was described in the petition as presented here by counsel for the American Federation of Labor. Offhand I cannot just remember the entire list of them. There is a considerable list of departments in the Famous-Barr Store, and I would not attempt to enumerate them from recollection. But they have been set forth in our petition very clearly.

Trial Examiner Myers: Suppose Miss White signed up the elevator operators at the Famous-Barr Store, the passenger elevator operators. Would you leave them in the Retail Clerks?

A. That would depend upon the circumstances surrounding those particular people, what their duties were and how they were connected with sales, what the economic proposition might be toward bargaining for their operators or in one large organization under the Clerks International Union. That would all have to be determined in an examination of the economic circumstances surrounding the group.

[fol. 26] Trial Examiner Myers: Who makes that determination?

A. I usually make those determinations.

Trial Examiner Myers: The American Federation of Labor?

A. Yes, sir, through me in this territory. I might make recommendations or suggestions. They usually go along with whatever I work out in connection with those things.

Trial Examiner Myers: What about the clerical help and people working in the executive offices of the Company, if Miss White signes those people up?

A. Those people as I recall it were not the strictly office employees; as I recall they were not included in our unit as we described it. However, the original petition is the best evidence of that. But the officers and employees in the general office doing nothing but executive office work were not related to sales and would not of course come into our union.

Trial Examiner Myers. You would put them into a separate group?

A. Yes, that particular group I would, and we are not interested in that group for the time being and have not been.

Trial Examiner Myers: In other words, it is your plan to organize the entire store, the selling and non-selling, and after you have them organized if you do have them organized you will separate the employees into different Locals as you see best?

A. I would not say I would, or I would not say that I wouldn't. That is a question you cannot answer ahead of the time you get the employees signed up, find out what their duties are and how they are related to each other. I do

not mean to evade the question, but it simply cannot be determined in advance.

By Mr. Harris:

Q. If I understand your answer to the Examiner's question, take for example the elevator operators, they might be in a separate union or might be in a unit with other employees depending upon the economic circumstances as you determine them after they are organized.

A. That would be up to the economic circumstances. It is my intention to set them all up in one union, under one organization. If I found it necessary for economic purposes after we had organized 100% of the employees to segregate them into various international unions for economic purposes, I would then establish a council, department store council, and work out one contract covering the entire store irrespective of any categories of employees, if I saw that to be the case.

Trial Examiner Myers: If the organizer signed up people whose jurisdiction came under an international, you [fol. 27] would put those people in the international, wouldn't you?

A. Not necessarily.

Trial Examiner Myers: You would not keep the teamsters in with the sales clerks, would you?

A. There is no teamster in there. The teamsters so far as I know are already organized and have had a contract with the store for many, many years. I think they were excluded from our unit as described in our original petition.

Trial Examiner Myers: What about shoe salesmen?

A. Shoe salesmen are definitely inside the unit described by the American Federation of Labor.

Trial Examiner Myers: Wouldn't they come under separate jurisdiction, of a different international?

A. No, they do not. They would come under the clerks organization. They are selling employees regardless of what they sell. We do not make any division as to the commodities they sell.

Trial Examiner Myers: All right, go ahead.

By Mr. Harris:

Q. How about the barbers? Would you include the barbers in the same unit with the cashiers, would you say?

A. That again would depend upon the economic circumstances surrounding them. I do not know what the barbers do. I do not know exactly what their relationship is to the store and its activities. I would have to have them signed up to know.

Q. Your answer is at the present time you cannot say whether the barbers would be in a unit with the cashiers or elevator operators or anybody else?

A. I do not know what their economic relationship is to selling.

Q. They might or might not be?

A. That is true, that would depend upon the circumstances.

Q. And you would not want to say at this time either way on it, whether you would have them in a separate unit or not?

A. No, I would not commit myself today on something where circumstances might change tomorrow.

Q. You would not want to say at this time under no circumstances would you always insist upon having one unit for the employees of Famous-Barr?

A. So far as I am concerned, today that is my position, one unit. What I might say some other time is another matter and I do not think concerned with this case.

Q. Your position at the present time is that would depend upon what the economic circumstances might develop?

A. My position at this time is set forth in our petition to intervene.

Trial Examiner Myers: Did you see the petition?

A. Yes, I saw it and heard it read and signed it.

[fol. 28] Trial Examiner Myers: This is the petition you are signing today?

A. Yes, sir.

Trial Examiner Myers: And not the petition in the other case?

A. That is right.

Trial Examiner Myers: What do you mean by this, excluding among others "all employees under agreement with labor organizations having agreements with the said com-

pany in bargaining units composed of well established craft units in department store operation"?

A. I mean by that electricians, painters, upholsterers, teamsters, the carpenters who had contracts with the Famous-Barr Company as craft organizations. I believe around about somewhere near forty years.

Trial Examiner Myers: Will you let me have Volume 39, please, Mr. Hackler?

By Mr. Harris:

Q. Ms. Theiss, is your position on this as stated by your counsel in the previous Representation case, or as stated in this motion to intervene which the Examiner was reading?

A. Our position was very clearly set forth in the other case that was held here between your organization and the store company, and our present position in this case is simply a continuation of that policy.

Q. Are you including at the present time the office and clerical employees? You said something about it a moment ago, and it slips my mind what you did say, whether you included them or not.

A. I suggest we re-read the record.

Q. What is your position on it? I assume your position would be the same as it was a few moments ago.

A. My position was with reference to executive employees engaged in executive and administration work in the general office, that they would not come within the unit. There are office employees and employees in Famous-Barr Store who would come under the jurisdiction of this particular organizational activity and within this unit, but they are not employed as I understand it in the general office. They would be store clerks and credit—office workers dealing with credit accounts, charge accounts and various things of that kind which are certainly a part of the unit. There are other office workers in there who have no relation to that particular thing and are employed in the general office. They would come under the jurisdiction of no organization, and so far as I am concerned are outside of this unit, and we set them outside in the original position.

Q. Is it your position now regardless of what it may have been that you are not including general office and clerical [fol. 29] employees?

A. Except where their duties are related to selling or the duties of non-selling employees who do sell.

Q. You mean people who might be out in the store?

A. That is right, depending again upon circumstances and connections and relationships.

* * * * * * * * *

* * * Is there a separate international affiliated with the American Federation of Labor for elevator operators?

A. There are about two international unions in the American Federation of Labor that take elevator operators. In fact, there could be three.

By Mr. Harris:

Q. And elevator operators at Famous-Barr could be members of any one of those three, or all three of them?

A. As to whether or not the elevator operators—it depends upon where they operate, the extent of their duties and what they are moving, whether it is human beings, whether it is freight or whether they are operating in a warehouse, department store, or hotel. There are several things that enter into those things.

Q. The Famous-Barr has passenger elevators and freight elevators both, do they not?

A. I believe they have.

Q. Are there separate internationals for passenger and freight elevators?

A. There could be. If we were following strict jurisdiction lines there could be. That is correct.

Q. Are there separate internationals for barbers?

A. Yes, there is.

Q. There are barbers at the Famous-Barr, are there not?

A. I don't know. I haven't any of them signed up. I haven't any evidence that there is, so far as I am concerned.

Q. Do you know whether there are any there or not?

A. No, I don't.

Q. Is there a separate international for beauticians, or beauty operators?

A. The beauticians go into the barbers international union ordinarily, if they are actually strictly engaged in private beauty operations for commercial purposes. I know the position of beauty operators in this department store would depend entirely upon how they render the service.

Q. My question was merely is there an international union of the American Federation of Labor for beauty operators?

A. Yes, they go in the barbers' international union under certain circumstances.

Q. Is there an international union in the American Federation of Labor for bakers?

A. Yes, there is one for that.

Q. Is there an international union for ladies alteration departments?

A. Well, there is an international union in the American [fol. 30] Federation of Labor that does take jurisdiction over employees engaged in alteration departments, under certain circumstances.

Q. Is that the I. O. G. W. U.?

A. It could be. Not necessarily.

Q. It could be another organization, it could be one organization or the other?

A. It might be the United Garment Workers, depending upon whether male or female workers and what they worked on and what their services are.

Q. What is the distinction between the I. O. G. W. U. and the United Garment Workers, if you know?

A. They are related, too.

Q. You said something about whether men or women workers. Is there a distinction there?

A. The Ladies Garment International Union can take nothing but women in that particular line of work.

. . . . . .

Q. Is there a separate international union for men's alteration departments?

A. They could go in the United Garment Workers International Union under certain circumstances, but one of your international unions might contest that jurisdiction.

Q. What is the jurisdiction of the United Garment Workers?

A. They usually cover male employees engaged in making men's garments of certain kinds.

Q. Roughly, the same as the Amalgamated?

A. The same line. Your Amalgamted Association has been a dual organization for the Garment Workers for many years.

. . . . . .

By Mr. Harris:

Q. Is there a separate international for cooks?

A. They could go in at least two international unions, depending upon what they were cooking and where they were cooking.

Q. What two internationals could they go into?

A. They could go in the Bakers International Union in one instance if making confectionery food. They could go in the Hotel & Restaurant Employees International Association cooking food. I could think of a lot of other kinds of cook that could go into one international union aside from that.

Q. Who are they?

A. I know you are not interested in that.

Q. Does Famous-Barr have any cooks that might go in any of those others?

A. Under certain circumstances, if we were following craft organization I believe Famous-Barr would have some cooks that would probably go into both the bakers international union and the others if we were following craft organizations, which we are not in any of these instances.

[fol. 31] Q. How about waiters and waitresses? Are there separate internationals for each of those?

A. They go in the same international union that the cooks go in, Hotel & Restaurant Employees and Bartenders.

Q. The same as they have for Bartenders?

A. I don't know whether they do or not. They have a contributing service to the public that enter the store in a relationship that I believe amounts to a service that draws trade and sells products. That is the reason I seriously question whether any of these international unions take jurisdiction over them. That is what I mean when I say it depends upon the economic facts and circumstances, whether these businesses you are mentioning are operating strictly on a commercial basis, standing on their own merits, or whether they have not been set up in there to encourage patronage of the store or to sell some products the store is interested in.

Q. You think that might make some difference?

A. It would be all the difference in the world to me.

Q. How about carpenters and machinists?

A. Carpenters do have their organization in there and have been under contract about forty years.

Q. I want to ask about that. Are you familiar with the contract which the American Federation of Labor or any of its affiliated organization has with the Famous-Barr at the present time?

A. That depends upon what you want to know about them.

Trial Examiner Myers. Do you know that they have any?

A. I know they have them, yes.

* * * * * * *

Mr. Harris. I did not ask the details, but started to ask what organizations have contracts. That is all I am interested in.

Trial Examiner Myers: Does the organization have contracts?

A. I think I stated that about twice already.

Trial Examiner Myers: Well, do you know?

A. The teamsters and electricians——

Trial Examiner Myers: In the store?

A. Teamsters, electricians, carpenters, and painters have agreements and the Upholsterers International Union has an agreement with these people.

By Mr. Harris:

Q. Is there a shoe repairmen's unit that has a contract there?

A. With the Famous-Barr people?

Q. Yes.

A. Not of the American Federation of Labor, that I know of.

[fol. 32] Q. Not with the CIO, either. These are all of the international unions that have contracts with the Famous-Barr, the ones you have just named?

A. So far as I know, and they have had them about forty years or long before the American Federation of Labor or CIO started this campaign.

* * * * * * *

Trial Examiner Myers: Do you know when these contracts were first effected?

Mr. Tucker: No, I do not know the date, but they have been in force for a good number of years.

Trial Examiner Myers: Would you say for the past thirty years?

Mr. Tucker: I don't know if they have been in effect that long. The chauffeurs have undoubtedly gone that long, or longer.

Trial Examiner Myers: That is the teamsters?

Mr. Tucker: The tea ers and chauffeurs. The others probably less long.

Trial Examiner Myers: You could safely say upwards of twenty years?

Mr. Tucker: Yes, I should think so.

. . . . . .

Q. Do you know whether the cooks and waiters of the American Federation of Labor have tried to organize the Famous-Barr at various times?

A. Yes, they have. In fact, I think about everybody in the American Federation of Labor and CIO both have tried to organize there a various times.

Q. Are you trying to organize the Pine Street warehouse?

A. If the Pine Street warehouse isn't organized, it is included. I just recently organized one of the Famous-Barr warehouses and I cannot recall that address.

Trial Examiner Myers: That is Spring Avenue.

A. That is about a year ago. That one is excluded from the unit. The other warehouses if connected with the store are included in the unit.

By Mr. Harris:

Q. You are trying to organize the company warehouses?

A. Yes, that is right.

Q. What is the setup at the Spring Avenue warehouse? Is there one unit there or several?

A. Well, there has not been any unit set up there except the one described in the petition.

Q. No, the Spring Avenue warehouse.

A. The one organized about a year ago?

[fol. 33] Q. Yes.

A. That agreement was consummated between the Teamsters and Chauffeurs International Union, I think, for all of the employees there are if I remember correctly. I do not think there is any other organization involved except the Teamsters and Chauffeurs.

Q. Isn't there an operating contract for the Furniture Workers and Furniture Repairmen?

A. At the Spring Avenue Warehouse?

Q. Yes.

A. I don't remember that. There could be.

Mr. Tucker: I can straighten that out. Yes, there is a separate Local. It *is* with the Teamsters, but for a separate Local.

Trial Examiner Myers: What is the separate Local?

Mr. Tucker: It is a separate Local of the Teamsters & Chauffeurs Union, but has a contract for furniture handlers and the union which represents the general drivers.

Trial Examiner Myers: Who is covered by these contracts? Are there more than one contract?

Mr. Tucker: There is more than one contract.

Trial Examiner Myers: How many are there?

Mr. Tucker: There are three different contracts at the Spring Avenue warehouse.

Trial Examiner Myers: Who do they cover?

Mr. Tucker: Virtually all employees at the Spring Avenue warehouse.

Trial Examiner Myers: Now, we have the furniture—what is it?

Mr. Tucker: First would be the general package delivery drivers and helpers.

Trial Examiner Myers: And that is a separate Local of teamsters?

Mr. Tucker: Of American Federation of Labor teamsters.

Trial Examiner Myers: Then you have the next one——

Mr. Tucker: The next is with the Furniture Drivers and Helpers.

Trial Examiner Myers: And that is with the Local of teamsters?

Mr. Tucker: Yes, sir. The third contract is with the furniture handlers and warehouse employees in the warehouse.

Trial Examiner Myers: The Furniture Handlers and Warehouse Employees?

Mr. Tucker: Inside the warehouse.

Trial Examiner Myers: And that is a separate Local of Teamsters?

[fol. 34] Mr. Tucker: That is right.

Trial Examiner Myers: Is that a Local of——

Mr. Tucker: I think they are all under the Teamsters International Union as I recall it, and they do have some seven or eight locals in the city. They operate in the city under a council of the Teamsters International Union through a join council.

By Mr. Harris:

Q. How was that organization conducted at the Spring Avenue warehouse? What sort of membership cards were signed, similar to the ones in use here?

A. Yes, that is my regular type of card. I use that regardless of the nature of the unit. I used it seven or eight years in this territory.

Q. What has been generally speaking the policy of the American Federation of Labor in this territory or area with regard to the industrial craft units? What has been your policy generally where you used this type of card and then obtained an organization? Has the policy been to break down into various craft units which might have jurisdiction?

A. Not always. We have allowed economic circumstances and conditions to develop the policy as we came to them.

Q. Can you give us an example of a large business that has been organized and has not been broken up into crafts?

A. Offhand, the Mississippi Glass, a large industry employing all kinds of people, part of them carpenters and glaziers, machinists and everybody else all under one union. That is one I can think of right quick.

Trial Examiner Myers: What is the name of that union?

A. The Federal Labor Union, Wire & Corrugated Glass Workers. Federal Labor Union.

By Mr. Harris:

Q. They belong to a Federal Labor Union?

A. Right.

Q. What is the difference, if there is any, between the Federal Labor Union and the American Federation of Labor and all affiliated organizations?

A. It is a part of that setup. It is one of the affiliated organizations.

Q. The Federal Labor Union is a part of it?

A. It is run directly by the American Federation of Labor and not by any existing International Union.

Trial Examiner Myers: How long has the Federal Labor Union charter remained in existence?

A. Well, it might remain in existence forever, or it might not.

Trial Examiner Myers: They might break it up into locals?

A. It could be, and there are many Federal Labor Unions [fol. 35] that have been organized for years and still remain Federal Labor Unions. Other certain labor unions have been organized.

Q. And were large numbers of them reorganized?

A. They finally established internationals, yes sir. Some Federal Labor Unions were organized and eventually turned over to already existing International Labor Unions. The Federal Labor Union is a sort of an expedient organization to take care of peculiar circumstances and bring about economic unit and establish collective bargaining to the best advantage of the members involved.

Q. Generally speaking, the Federal Union Labor is an industrial type of union, is it not?

A. Not always. In most cases, yes, but not always. In fact, we have among the hundred and twelve International Unions—I cannot tell you offhand how many of them were issued industrial charters, but a sizeable number of them do issue industrial characters of the same kind and nature as the Federal Labor Union.

Q. Is there any Federal Labor Union Charter out in this Famous-Barr store now?

A. Not as yet.

Q. Can you give us any example where it was organized on the basis of the American Federation of Labor and all affiliated organizations and no Federal Labor Union has been issued where there has not been a break down in the craft?

A. Yes, the General Cable Company.

Q. What is that?

A. Under the Electrical Workers.

Q. I asked you about where an organization has been on the basis of the American Federation of Labor and all affiliated organizations.

A. That is correct. The records of the Labor Board will show that.

Q. They were all members of the International——

A. They were signed up on exactly the kind of a card you hold in your hand. Petition was filed for certification with the Labor Board and exactly under the same title, American Federation of Labor and its affiliated International Unions. The International Union of Electricians issued an industrial charter and took all of the employees regardless of what they were doing, carpenters, painters, blacksmiths, electricians, wire-men, plumbers, laborers and everything else.

Trial Examiner Myers: And teamsters?

A. Some teamsters and truckers, yes.

By Mr. Harris:

Q. They all belonged to the International Brotherhood of Electrical Workers?

A. They do.

[fol. 36] Trial Examiner Myers: Did the Board certify that unit?

A. The Board certified that unit in the name of the American Federation of Labor and its affiliated International union.

By Mr. Hackler:

Q. How long has that been in existence?

A. If my memory serve me right, about five or six months.

. . . . . .

Q. Have there been a great many or have there been any where organization was on the basis of the American Federation of Labor and all affiliated organizations, where they were broken down into crafts?

A. There have been some of them.

Q. Have there been many?

A. I would say they are probably in the minority.

Q. Those have been broken down?

A. That is right, where they have broken down. Certain labor unions have been issued to sustain certain industrial types of organization. Internationals have issued charters covering all employees in certain trades and certain industries to retain an industrial type or organization to perpetuate real, honest to God collective bargaining. Say for

instance, the machinists, that just issued some industrial charters covering whole plants of workers.

* * * * * * * *

By Mr. Tucker:

Q. I understand your testimony to be in response to Mr. Harris's question that various classes of employees in the Famous-Barr Store would be eligible to membership in various of the International Unions. That is correct, isn't it, that they would be eligible?

A. I said they could be under certain circumstances.

Q. That is right, could be under certain circumstances.

A. That is correct.

Q. I understood further they were eligible and that you had no intention if you were now in a position to bargain for all employees of the store to put them into separate unions?

A. I did not leave that inference. If anybody drew that, they were incorrect. Up to this time I have one organization in mind.

Q. Along those lines, then, it is my understanding of your testimony—and correct me if I am wrong—that it is your present intention and if you now represented the employees of the store you would put them all in one union?

A. In one union. I would.

Q. And bargain for them as one unit? Is that correct?

A. That is my position today. What it might be next month or six months from now might be another thing.

Q. That change in position would depend upon the change in circumstances?

A. It would depend upon the change in circumstances [fol. 37] and change in the amount of information I might have concerning the duties of these people.

Q. If the facts were as they are now——

A. They would stay there.

Q. You would not split them up into different organizations?

A. If the facts remain as I know them today, and if economic circumstances remain as I know them today, they would stay there.

Q. In one unit?

A. That is correct.

Q. And in one union?

A. Correct.

Q. Are there any circumstances you can think of under which you would change the bushelmen in these two departments the CIO are contending for in a separate unit if you represented all employees in the store today?

A. No, I cannot. Definitely, as I understand the bushelmen there, they are only rendering a service to the sale. They are not charging the customers for any alterations or repairs they make to the suits.

* * * * * * *

Q. Your position with reference to the appropriate unit at the Famous-Barr Store is the same as was found by the Labor Board to be your position in its decision in the representation case last winter, is that correct?

A. That is correct.

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Mr. Harris: Mr. Examiner, at my request, the Board has produced here for the hearing a copy of certain portions of the transcript of testimony in the case now pending, 14-C-596, May Department Stores, doing business as Famous-Barr Company, and United Retail, Wholesale and Department Store Employees Union of America, CIO. I would like to read from a portion of the testimony by Fred Z. Salomon, General Manager of the May Department Stores Company.

* * * * * * *

Mr. Harris: I am reading from Page 486.

"Q. Actually your contracts with labor organizations, outside of the Teamsters, at the Spring Avenue Warehouse have been with maintenance crafts of the American Federation of Labor such as carpenters, plumbers, and such as that, isn't that true?

"A. No, it is not true.

"Q. What other labor organizations have you had contracts with other than those building and maintenance crafts?

"A. We have had contracts with carpet layers, upholsterers, shoe repair workers, bushelmen, with picture frame [fol. 38] workers, all of the crafts, with few exceptions, that are not building trade crafts and not crafts.

"Q. Have you ever had any contract that covered sales people?

"A. I cannot recall."

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Mr. Examiner, at my request the Board also produced here the official transcript of the testimony taken in the previous representation case, Case 14-R-508, in the Matter of May Department Store Company, doing business as Famous-Barr Company, and Department Store Employees Union Local 372, affiliated with the United Retail, Wholesale and Department Store employees of America, CIO, the testimony taken November 18, 1942.

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Mr. Harris: Reading from Page 5 of the transcript I just referred to, following a question of the Trial Examiner, or rather following a statement of the Trial Examiner requesting the appearances, there is this statement of the Trial Examiner:

"Any other appearances?

"Mr. McElwee: Claude W. McElwee, 801 Title Guaranty Building, St. Louis, appearing for the Waitresses Local 249, A. F. L."

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EMANUEL BOGGS (called by the Union).

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Direct examination.

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Trial Examiner Myers: All right. Put the stipulation on the record. It is stipulated by the parties that the Petitioner and Intervenor are labor organizations within the meaning of the Act?

Mr. Tucker: That is correct.

Mr. Wilson: That is all right.

Mr. Harris: It is so stipulated.

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ELMER P. THEISS (called by the Union).

Direct examination.

Q. Have you made a survey that you spoke of a while ago, you usually make a survey, have you made such a survey at Famous-Barr to determine what International Unions might claim jurisdiction?

[fol. 39] A. I have not made the usual survey in connection with Famous-Barr as I did in other plants I had organized because in the other plants I would have arrived at that position. I think probably the vast majority of the authorization cards, they would disclose the classification and probably give a very true picture. In the Famous-Barr case, as the record will show, we submitted here one hundred and eight some odd cards.

Trial Examiner Myers: One hundred and eighty-eight.

A. If I made a survey in connection with those cards I think you can readily see it would be a very limited one and would not even begin to give me a picture what was inside the plant. All I can operate on so far as Famous-Barr is concerned is what I am told by the employees, what I know by observation and information I must obtain in an authenticated way what kind of people are in there. If I made a survey of the one hundred and eighty-eight cards that we submitted in this case it probably would not disclose over ten or fifteen classifications of employees. I do know that the Famous-Barr Company probably employs some two or three hundred different classifications of workers and until I had those cards I certainly would not be in position to make a survey with the idea in mind of going to various international unions. I have had conferences with International Union representatives I think would have an interest in this case and they have agreed with my policy to organize it on an industrial basis. I have gone forward in that way. There has never been but one organization created here.

By Mr. Harris:

Q. What International Unions have you had conferences with?

A. I have discussed this thing with possibly some ten or fifteen organizations I thought might raise some question, and——

Q. What are they?

A. Well, I have talked it over with the Teamsters, the Carpenters, the Electricians, the Painters, the Upholsterers and the Garment Workers.

Q. You mean the United Garment Workers?

A. I have had some limited conversations with the United Garment Workers from time to time, the Ladies Garment Workers——

Q. When did you discuss it with the United Garment Workers?

A. I have always discussed organization activities with representatives of any and all unions I think might raise a question, whether I thought they were justified in it. It has always been my policy to try and beat them to the gun; if I can handle this before they would have a chance to fight it, then there is no trouble.

[fol. 40] Q. Why did you think United Garment Workers, or the International Ladies Garment Workers were interested?

A. I naturally talked this thing over with them. They are part of the labor movement in St. Louis. I have even called the Plumbers and the Steam Fitters and talked with them.

Q. About Famous-Barr?

A. Yes, all kinds of people, I have talked to them all about it.

Q. You said you thought that United Garment Workers and the International Ladies Garment Workers might have an interest in Famous-Barr?

A. I did not say I thought they might be interested, I talked to them against the chance they might raise a question concerning interest. That has been my policy. I have had no question raised by the United Garment Workers, in fact they never made any claim so far as I am concerned on the bushelmen, if that is what you are driving at. The United Garment Workers never said anything to me that they wanted the bushelmen in the store. They do know what our program is. They are advised of that and are acquainted with it and they are very apparently satisfied with it because they have never come forward with any claim I should do other than set up the bushelmen in that union.

Q. Have you advised them whether or not you organized any bushelmen?

A. I would advise them if there are bushelmen employed there. I understand there are bushelmen employed there.

Q. Have you advised them whether you have organized the bushelmen?

A. I have not, I follow the method——

Q. As I understand what you said a moment ago about your survey, do you mean one hundred and eighty-eight cards does not give you a sufficient picture of conditions at Famous-Barr to make the customary survey?

A. I said one hundred and eighty-eight cards would not disclose a large enough classification of workers as against the entire number that are possibly employed at Famous-Barr to give me grounds to make an authentic survey based on facts. The facts would be absolute, I would have to depend on hearsay, what somebody else has told me, what I could find out, what I could see with the eyes alone.

Q. Let's get back to the question I thought was answered before, apparently it was not. Suppose you are organizing the XYZ Company with that type of card you are using here, how do you determine whether or not there will be possible conflict in jurisdiction?

A. It would depend upon what XYZ Company was manufacturing, it would depend on what manufacturing material was used in the manufacture of that commodity, it would depend on many things. I would have to take all those [fol. 41] things into consideration and set up our policy.

Q. As one of the things, would you consider the type of work performed by the people who signed up?

A. That would be one of the contributing factors in my overall decision we might make after we had all the circumstances.

Q. Would you say that is an important factor?

A. Well, yes, it could be important and in some cases it is vitally important and in other cases it might not be so important. We have to take into consideration,—ordinarily we speak of electricians, we think of them as journeymen electricians and you think of a craft union but that is not always the truth because the Electrical Workers International Union issues an industrial charter covering all employees in a plant manufacturing electrical products used by the electricians.

Q. If they issue an industrial charter like that, do they have to obtain permission from any one to do so?

A. No, they have already been given permission to issue a charter to industries of that nature. The same thing is true of the machinists.

Q. Industries of what nature?

A. Industries of the nature which would manufacture the electrical products used by the trade. In that case the electricians have the right to issue industrial charters, and do so.

Q. But that is limited to the electrical industry?

A. Yes. On the other hand the machinists have the same right, to issue industrial charters for industries producing commodities used by the trade. For instance, take the industry producing wrenches and tools, in that case the Machinists International Union would issue an industrial charter and in certain kinds of job shops they have the right to issue an industrial charter.

* * * * * * *

Trial Examiner Myers: As a matter of fact, isn't it the purpose of this card you use, American Federation of Labor and all its affiliated organizations, after you got the plant organized to divide them up into Internationals where they actually belong?

A. Not always. The card is used as an expedient to organize the plant, either industrially or in crafts. It sets out a set of circumstances which the card lends itself to, whatever you want to do with it, that is the truth about it.

* * * * * * *

Trial Examiner Myers: You have not signed any bushelmen, have you?

A. I don't think there was any among there, I am not positive.

[fol. 42] Trial Examiner Myers: I checked them and I have not found the cards.

A. I don't think there was.

* * * * * * *

Trial Examiner Myers: Before we go further with the Intervener's case, I would like to state for the record the check I made of the cards submitted to me by the Intervener.

The Intervener submitted 188 cards. I carefully checked these cards against the personnel records of the Company, with the following result:

Of the 188 cards, 52 bore names of persons no longer in the employ of the Company.

There were 22 which bore names of persons not found on any list or record submitted to me by the Company. And I may add that the Company gave me access to five separate lists and personnel records.

Three cards bore names of persons employed by the Company at its Spring Avenue warehouse.

Of the remaining 111 cards, 8 bore printed signatures. The other 103 cards bore apparently genuine original signatures of persons in the employ of the Company on May 7, 1943.

Of these 111 cards, 68 bore apparently genuine original signatures, and 4 bore printed signatures of non-selling employees distributed throughout the store and the St. Charles Street Warehouse.

Mr. Harris: Would you mind stating that again?

Trial Examiner Myers: 68 bore apparent genuine original signatures and 4 bore printed signatures of non-selling employees distributed throughout the store and the St. Charles Street Warehouse.

Of this number, approximately 75% were employed as maintenance employees, elevator operators, porters and the like. The balance are engaged in other non-selling departments of the store.

These cards bore dates from September 27, 1941 to April 18, 1943. Sixteen of these 71 cards bore dates in 1941, 27 cards bore dates in 1942, and 27 bore dates in 1943. One card bore no year but had a date.

Of these aforesaid 111 cards, 35 bore apparently genuine original signatures, and 4 bore printed signatures of persons engaged in selling merchandise within the store proper. These 39 cards bore dates from September 28, 1941 to March 25, 1943, 5 cards bore dates in 1941, 20 cards bore dates in 1942, and 14 cards bore dates in 1943.

[fol. 43] One card, dated April 8, 1943, was submitted which bore an apparently genuine original signature of a person engaged by the Company as a regular selling extra.

In the 188 cards submitted by the Intervener, I found no duplicate. Neither did I find any card signed by any person in the unit alleged by the Petitioner to be appropriate.

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PETITIONER'S EXHIBIT 2

Before the National Labor Relations Board

Fourteenth Region

Case No. XIV-R-508

In the Matter of THE MAY DEPARTMENT STORES COMPANY, d/b/as Famous-Barr Company and Department Store Employees Union, Local 372, Affiliated With United Retail, Wholesale & Department Store Employees of America, C. I. O.

AMENDED MOTION TO INTERVENE

Pursuant to the National Labor Relations Act and the Rules and Regulations of the National Labor Relations Board, hereinafter referred to as the Board, the International Ladies' Garment Workers' Union, hereinafter referred to as the ILGWU, hereby files its Motion to Intervene in the Matter of the May Department Stores Company, doing business as Famous-Barr Company, hereinafter referred to as the Company, and Department Store Employees Union, Local #372, hereinafter referred to as the C. I. O.

In support of this Motion, your petitioner states that on or about the 9th day of November 1942, the ILGWU notified Charles Hackler, Esq., one of the Regional Attorneys for the Fourteenth Region of the Board, of its interests in any matters brought before the Board, relative to and effecting the alteration workers and dressmakers in the dress and ready-to-wear departments, dressmaking instructors employed by Famous-Barr Company at its store in St. Louis, Missouri. [fol. 44] The ILGWU did, prior to notifying the Board of its interest in the said workers, carry on an organizing campaign among the said employees at the Famous-Barr store of the Company, and represents a number of the employees included in the unit above set out.

The ILGWU now represents the alteration workers and dressmakers employed by the May Department Store Company at its Cleveland, Ohio store and throughout the United States, the ILGWU represents large numbers of alteration workers, dressmaking instructors employed in the dress, ready-to-wear departments in stores similar to Famous-Barr Company.

The ILGWZ respectfully states that the employees herein above described constitute an appropriate separate collective bargaining unit, and should not be included within the larger unit sought by the C. I. O. in its Petition for Certification; that the said employees are engaged largely in production and manufacturing activities, as distinguished from the selling, service and related activities performed by the other employees described in and sought to be included in the unit specified by the C. I. O.

Wherefore, the ILGWU respectfully prays for leave to intervene in this matter and to be heard in these proceedings on behalf of the alteration workers, markers and fitters, dressmakers and dressmaking instructors employed in the dress, ready-to-wear departments of May Department Stores Company at its Famous-Barr Company store, at 7th and Olive Streets, in St. Louis, Missouri.

Respectfully, submitted, (S.) Verna Grayson, International Organizer, International Ladies' Garment Workers' Union, 110 North 9th Street, St. Louis, Missouri.

Dated November 17, 1942.

Subscribed and sworn to before me this 18th day of November, 1942. (S.) Irene Whalen, Designated Agent.

[fol. 45] PETITIONER'S EXHIBIT 3

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD, FOURTEENTH REGION

Case No. XIV-R-617

Dated, Filed April 7, 1943

In the Matter of LANE-BRYANT COMPANY *and* INTERNATIONAL LADIES GARMENT WORKERS UNION, AFFILIATED WITH AFL.

Petition for investigation and certification of representatives pursuant to Section 9 (c) of the National Labor Relations Act.

1. Name of employer: Lane-Bryant Company.

2. Address: Sixth and Locust, St. Louis, Missouri.

3. General nature of business: Retail store ladies' ready-to-wear.

4. Description of the bargaining unit which petitioner claims is appropriate: All alteration workers in the St. Louis store, excluding forelady, supervisors of higher rank, and all other employees of the Company.

5. Approximate number of employees in such unit: 21.

6. Approximate total number of employees in plant or plants involved: 250.

7. Number or percentage of employees in such unit who have designated or selected petitioner to be their representative for collective bargaining: Over 51%.

8. Who is the present bargaining representative of employees? None.

9. Names, addresses, and affiliation of any other known individuals or labor organizations who claim to represent any of the employees in such bargaining unit: None.

10. Is there an existing or recently expired contract and if so give expiration date? No.

[fol. 46] 11. The undersigned hereby alleges that a question has arisen concerning the representation of the employ-

ees in the above bargaining unit, in that: On March 31, 1943, the petitioner wrote to the company asking for recognition and immediate conference to open negotiations. To date they have received no reply.

The undersigned further alleges that said question concerning representation is a question affecting commerce within the meaning of said act.

The undersigned requests that pursuant to section 9(c) of the National Labor Relations Act, the National Labor Relations Board investigate such controversy and certify to the parties the name or names of the representatives that have been designated or selected by said employees.

Name and address of employees or representatives filing the petition. (If made by a labor organization, give also the full name, local number and affiliation of the organization and the name and official position of the person acting for the organization).

International Ladies' Garment Workers Union, Affiliated with AFL, by W. Don Ellinger, *Representative*, 110 North 9th St., Ga. 4667.

Subscribed and sworn to before me this 7th day of April, 1943, at St. Louis, Missouri. Marie A. Pierce, *Field Examiner*. (Seal.)

[fol. 47] BEFORE THE NATIONAL LABOR RELATIONS BOARD, FOURTEENTH REGION

Case No. 14-C-872

In the Matter of MAY DEPARTMENT STORES COMPANY, DOING BUSINESS AS FAMOUS-BARR COMPANY *and* ST. LOUIS JOINT COUNCIL, UNITED RETAIL, WHOLESALE & DEPARTMENT STORE EMPLOYEES OF AMERICA, C. I. O.

Room 1413, INTERNATIONAL OFFICE BLDG., 722 CHESTNUT ST., ST. LOUIS, MISSOURI, October 14, 1943.

The above entitled matter came on for hearing, at ten o'clock A. M., pursuant to notice.

Before: William E. Spencer, Trial Examiner.

Appearances: Charles K. Hackler, 1416 International Office Bldg., St. Louis, Mo., appeared for National Labor Relations Board, Lewis, Rice, Tucker, Allen & Chubb, by Mil-

ton H. Tucker and Robert T. Burch, 208 N. Broadway, St. Louis, Mo., appeared for respondent. Emanuel Boggs, Suite 924, 705 Olive St., St. Louis, Mo., appeared for United Retail, Wholesale & Department Store Employees of America, C. I. O.

* * * * * * *

By Mr. Hackler:

Mr. Examiner, I wish to direct attention to paragraph No. 1 of respondent's amended answer to complaint, wherein there appears an admission of the allegations contained in paragraphs numbered 1, 2, and 3 of the complaint. Those last three paragraphs, as the complaint shows on its face, contain allegations concerning the nature of the company's business and operations. I am not offering evidence in support of the allegations in paragraphs 1, 2, and 3 because of the admission, that I take it was intentional in the answer.

Mr. Tucker: That is correct.

Mr. Hackler: And the facts therein stated, for the purpose of this proceeding, are true?

Mr. Tucker: That is correct.

Trial Examiner Spencer: In view of that, I see no need of offering evidence on that, you have a stipulation to cover the matter there.

Mr. Hackler: I take it the allegations there are stipulated, as to the facts, subject to your objection as to the legal conclusion?

Mr. Tucker: That is right, exactly.

* * * * * * *

[fol. 48] (Appearances of Counsel omitted in printing)

[fol. 49] In United States Circuit Court of Appeals, Eighth Circuit

Order of Argument—November 16, 1944

This cause having been called for hearing in its regular order, argument was commenced by Mr. Eugene R. Thorrens, Principal Attorney, National Labor Relations Board, for petitioner, and the hour for adjournment having arrived further argument was postponed until tomorrow morning.

[fol. 50] In United States Circuit Court of Appeals, Eighth Circuit

Order of Submission—November 17, 1944

This cause having been called for further hearing, argument was resumed by Mr. Eugene R. Thorrens, Principal Attorney, National Labor Relations Board, for petitioner, and concluded by Mr. Robert T. Burch for respondent.

Thereupon, this cause was submitted to the Court on the petition to enforce order of the National Labor Relations Board, the Answer thereto, and on the pleadings and proceedings before said board and the briefs of counsel filed herein.

[fol. 51] In United States Circuit Court of Appeals, Eighth Circuit

No. 12,840

On Petition for Enforcement of Order of National Labor Relations Board

National Labor Relations Board, Petitioner,

vs.

May Department Stores Company, Doing Business as Famous-Barr Company, Respondent

Mr. Eugene R. Thorrens, Principal Attorney, National Labor Relations Board (Mr. Alvin J. Rockwell, General Counsel, Mr. Malcolm F. Halliday, Associate General Counsel, Mr. Frank Donner and Mr. James R. Hemingway, Attorneys, National Labor Relations Board, were on the brief) for petitioner.

Mr. Robert T. Burch (Messrs. Lewis, Rice, Tucker, Allen & Chubb and Mr. Milton H. Tucker were with him on the brief) for Respondent.

Before Sanborn, Thomas and Riddick, Circuit Judges.

Opinion—December 20, 1944

[fol. 52] Thomas, Circuit Judge, delivered the opinion of the Court:

The National Labor Relations Board has petitioned the court to enforce its order entered December 17, 1943, requiring the respondent to cease and desist from refusing to

bargain collectively with St. Louis Joint Council, United Retail & Department Store Employees of America affiliated with the C. I. O., as the exclusive representative of all its employees at its St. Louis store engaged in the busheling room, second floor, department 280, and in the busheling room, basement, department 281, including regular and extra employees in these departments, but excluding the two foremen and all other employees of the respondent; and in any other manner interfering with its employees in the exercise of the right to self-organization.

The respondent is a New York corporation owning and operating stores in several states. In St. Louis it does business under the trade name of Famous-Barr Company. Approximately 5,000 employees are engaged in operating the St. Louis store, including about 43 employees in the unit involved in this proceeding.

On June 16, 1943, in a representation proceeding under § 9(c) of the National Labor Relations Act, 29 U. S. C. § 151 et seq., the Board issued its decision and direction of election in which it found that the employees in the busheling departments, supra, constituted a unit appropriate for the purpose of collective bargaining. The decision provided that the names of the C. I. O. and of the A. F. of L. should be placed upon the ballot, but at the request of the A. F. of L. its name did not appear. The election was held on June 29, 1943, and of the 43 eligible voters in the busheling departments 36 votes were cast for the C. I. O. union, 1 against, and 6 did not vote.

[fol. 53] The unfair labor practices alleged in the complaint, based upon charges of the Union, are (1) that although requested to do so the respondent has refused to bargain collectively with the Union, and (2) that in August, 1943, and subsequently, respondent took steps unilaterally to secure the necessary approval by the National War Labor Board of an adjustment of the wages of its employees at the St. Louis store. After a hearing these charges were sustained, and the order now sought to be enforced was entered.

The respondent answered the petition, (1) denying the jurisdiction of the Board and (2) alleging that the order is invalid for two additional reasons, namely, (a) because the union does not represent the employees in the bushel-

ing departments and (b) because the Board acted arbitrarily in determining the unit.

The jurisdiction of the Board is assailed for the reason, in substance, that the Famous-Barr store is not engaged in business affecting commerce within the meaning of the Act. The respondent admitted that in the operations of the Famous-Barr store it continuously causes large quantities of merchandise to be purchased and transported in interstate commerce from other states to the store in Missouri; that during the year 1942 it purchased and transported approximately $27,000,000 worth of such merchandise, approximately 70 per cent. of which was purchased and transported to the store from points outside of Missouri; and that during the same period it sold merchandise in excess of $27,000,000 worth, of which approximately 12 per cent. was transported from the store to points outside of Missouri. These facts, together with respondent's method of carrying on business as shown by the record, establish the jurisdiction of the Board. See *J. L. Brandeis* [fol. 54] *& Sons* v. *National Labor Relations Board*, 8 Cir., 142 F. 2d 977, cert. den. October 16, 1944, 89 L. ed. 56; *National Labor Relations Board* v. *Hudson Co.*, 6 Cir., 135 F. 2d 380, cert. den. 320 U. S. 740.

The contention that the St. Louis Joint Council, United Retail, Wholesale & Department Store Employees of America, affiliated with the Congress of Industrial Organizations, does not represent the employees in the unit found to be appropriate is without merit. The Board found that it does so represent them and the vote of the employees themselves in favor of this union as their representative for the purpose of collective bargaining was almost unanimous. The contention is based upon the assertion that none of such employees are members of the Joint Council. The Board found that "The Joint Council represents various locals of United Retail, Wholesale & Department Store Employees of American in St. Louis which admit to membership employees of the Company." The evidence shows that the employees in the unit certified in the representation proceeding are members of such a local, to-wit, Local 372; that this local is a part of the Joint Council; and that the Council is composed of the various locals in St. Louis.

Section 6 of the Act authorizes the Board to make rules and regulations necessary to carry out the provisions of

the Act. Pursuant to such authority the Board on July 11, 1939, promulgated a rule reading, "A petition to investigate and certify under section 9(c) of the Act the name or names of representatives designated or selected for the purpose of collective bargaining may be filed by an employee or any person or labor organization acting on behalf of the employees, or by an employer." 6 Cum. Supp. C. F. R., 8521. This rule was in effect when the petition for [fol. 55] investigation was filed and when the election was held. At that time the evidence tends to show that the employees understood that the Joint Council represented them. But the respondent argues that they signed cards designating Local 372 as their representative. Frank Verderber, a member of the master committee of Local 372, testified that at the time he signed the card he knew that Local 372 was a part of the Joint Council. When asked on cross examination the question, "Have you ever authorized the St. Louis Local Joint Council to represent you?", he answered, "I think that takes care of it automatically, when I signed that first card." His testimony on this point is corroborated by other testimony, and there is no contradictory testimony in the record. Further, in proceedings under § 9(c) of the Act, the petition serves no purpose other than to initiate an investigation. When the investigation results in an election the election determines the right of representation. Section 9(a) of the Act provides that "Representatives" are to be "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes"; and an election is a proper method of "selection" under the Act.

The respondent earnestly contends that the action of the Board in determining that the busheling departments in the St. Louis store constitute an appropriate unit for collective bargaining was arbitrary and unreasonable. It is admitted that in deciding upon an appropriate unit the action of the Board under § 9(b) is discretionary, when and so long as such action is within the powers conferred by the Act. *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 8 Cir., 113 F. 2d 698, 701, aff'd 313 U. S. 146.

[fol. 56] The respondent argues that the Board in the exercise of its discretion has laid down certain factors for its own guidance and that its arbitrary conduct is shown in that it has disregarded its own criteria for determining an ap-

propriate unit and has not affirmatively found any facts to justify such disregard. These factors which the Board should observe are stated to be: (1) Community of interest; (2) similarity of wages, hours and working conditions; (3) functional coherence; (4) history of collective bargaining; (5) interchangeability of employees; (6) interdependence of operations; (7) eligibility to membership in the union or unions; and (8) special skills. The Board has not, of course, held these to be inclusive and indispensable criteria. Each case must be ruled by the sufficiency or insufficiency of its own facts.

After a full hearing in the representation proceeding the Board found that the employees in the two busheling departments are engaged in fitting and altering men's clothing purchased in the store, and that they are designated as fitters, markers, tailors, pressers, and finishers; that their work traditionally has been regarded as a skilled trade; that prior to 1920 these employees were members of a craft union which was a party to a collective bargaining contract with an employers' association of which respondent was a member. Since 1920 the respondent has recognized no union as the representative of these employees, although for many years it has recognized craft unions as the representatives of teamsters, electricians, carpenters, painters, and upholsterers.

The Board found, also that the parties all agree that the optimum unit for collective bargaining would include substantially all non-supervisory employees of the store, and concluded

[fol. 57] "Assuming, without deciding, that a store-wide, industrial unit will best effectuate the purposes of the Act, we note that no labor organizations claims to represent the employees in such a unit. We believe that collective bargaining should be made an immediate possibility for the employees in the busheling rooms without requiring them to await the uncertain date when the employees may be organized in a larger unit. We find accordingly that the employees in the busheling rooms constitute an appropriate unit. However, our finding in this respect does not preclude a later determination at another stage of self-organization that a larger unit is appropriate."

The respondent contended before the Board, as it does here, that the two busheling departments do not constitute an appropriate unit because it fails to include employees

in the women's alteration department. Among other things the Board found that although there is a high degree of similarity in the work done in these departments there is historically a sharp demarcation between the trades involved and that traditionally such workers have been represented by separate craft unions.

We have read the record carefully, and notwithstanding the contention of the respondent, all these facts found by the Board are abundantly supported by evidence. Since, therefore, the Board's decision upon this point has "warrant in the record" and a "reasonable basis in law", it is not arbitrary and must be accepted by this court. *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111.

We conclude that respondent was not justified in refusing to bargain collectively with the Union on the ground either that the unit certified by the Board was not an appropriate unit or that the Union did not represent that unit.

[fol. 58] The respondent further objects to the inclusion of paragraph 1(b) in the order sought to be enforced. Paragraph 1(b) directs respondent to cease and desist from "In any other manner interfering with, restaining, or coercing its employees in the exercise of the right to self-organization", etc.

The Board is without power to restain generally unlawful practices not found to exist or to be related to proven unlawful conduct, but the Board is free to restrain all unfair labor practices found to exist. *National Labor Relations Board* v. *Express Publishing Company*, 312 U. S. 426.

In this instance the complant alleged and the Board found that on or about August 31, 1943, the respondent took steps unilaterally to secure the approval by the National War Labor Board of a voluntary wage or salary adjustment affecting the salaries of approximately 4,530 employees in its St. Louis store, including employees in the unit represented by the Union, and that the action of the respondent in this connection was an unfair labor practice. This is the type of unfair labor practice sought to be restrained by paragraph 1(b) of the order.

The respondent argues that in making application for approval of a general salary adjustment to the War Labor Board it did only what it had a lawful right to do and that

the Union has no just or legal ground for complaint. The Board found that respondent's action under all the circumstances may reasonably be said to have undermined the Union among employees for whom it had been certified as bargaining representative, and to have discouraged employees generally in their union affiliation, thereby violating § 8(1) of the Act. The validity of paragraph 1(b) of the order depends, therefore, upon whether [fol. 59] the facts in evidence warrant the inference which the Board has drawn therefrom.

The fact situation relevant to this issue is shown in the record and reflected in the findings of the Board. During the entire period under consideration the C. I. O. and the A. F. of L. labor unions were engaged in carrying on a competitive campaign for membership among all the employees of the store. On March 13, 1943, the St. Louis Joint Council, C. I. O., filed its petition for investigation in this proceeding under § 9(c) of the Act; on June 16, 1943, an election was ordered; on June 29, 1943, the election was held, resulting in 36 ballots for the Union and 1 against; and on July 12, 1943, the Board certified the Union as representative of the unit for collective bargaining.

On July 19, 1943, the respondent refused to bargain with the Union on the ground that the employees in the busheling department do not constitute an appropriate unit.

On August 30, 1943, the respondent, without consulting the Union, made application to the National War Labor Board for approval of a voluntary wage adjustment with 4,530 of the employees in the store receiving salaries or wages of less than $2,600 a year, including those represented by the Union, but excluding the craft unions named above with which it had contracts for collective bargaining. In the letter transmitting the application respondent said:

"The St. Louis Joint Council, United Retail, Wholesale and Department Store Employees of America, C. I. O., claims to represent the employees in the busheling rooms of the store * * * We have not recognized this Union and have not bargained with it. * * *

[fol. 60] "We do not believe that * * * the organization * * * have [has] any interest whatever in the enclosed application. However, if the organization named * * * should object to the inclusion of Departments 280 and 281 in the application, you are advised that said applica-

tion may be considered as having been amended so as to exclude these employees from the application."

In the same letter respondent states:

"The application which covers the employees at the store shows that we have Union contracts and working agreements which cover certain craftsmen, including electricians, painters, carpenters and plasterers. These employees, being covered by collective bargaining agreements, are excluded from this application."

On September 1, 1943, respondent through its superintendent of employment announced to the employees over its public address system the filing of the application.

On September 3, 1943, the Union filed a charge that respondent had refused to bargain with it and had filed the unilateral application described above.

On September 11, 1943, Fred Z. Salomon, respondent's vice president, delivered a speech to the employees of the store over the public address system in which he said:

"On September 1st when we announced to you that the Famous-Barr Company had applied for permission to grant a general salary increase retroactive to August 2d, we told you that we would keep you informed as to the progress of our application; we have no news as to the progress of the application and we did not expect to talk to you again on the subject as soon as this, and still less did we think it would be necessary to make such a statement as we now have to make.

. . . . . .

"We have filed these applications in good faith and will do everything we can to secure their approval as soon as [fol. 61] possible. We sincerely hope that nothing will occur which will delay or obstruct or prevent this approval."

Considering the chronology of these events, and particularly the date of the filing of the application with the National War Labor Board so shortly after the certification of the Union and the refusal of respondent to bargain with it, we think the finding of the Board that the respondent's conduct constituted an unfair labor practice is supported by evidence.

We take it that the law applicable to the situation is well settled. The National Labor Relations Act makes it the duty of the employer to bargain collectively with the chosen representatives of his employees. *Medo Photo Supply Corp* v. *Labor Board*, 321 U. S. 678, 683; and since the obligation is exclusive it exacts "the negative duty to treat with no other." *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 44.

The employer can not disregard a certification by the Board. The certificate is valid until declared invalid by the court or replaced by the Board. *N. L. R. B.* v. *Appalachian Power Co.*, 4 Cir., 140 F. 2d 217, 222. The refusal of the employer to recognize the certificate does not excuse compliance at least for a reasonable time. *Valley Mould & Iron Corporation* v. *N. L. R. B.*, 7 Cir., 116 F. 2d 760; *N. L. R. B.* v. *Carlisle Lumber Co.*, 9 Cir., 99 F. 2d 533, 541.

It has long been settled that the findings of the Board are conclusive upon reviewing courts when supported by evidence; and inferences from the evidence are to be drawn by the Board and not by the courts, except as to questions of law, and upon such questions, the experienced judgment of the Board is entitled to great weight. *Franks Bros.* v. *Labor Board*, 321 U. S. 702; *Labor Board* v. *Southern Bell* [fol. 62] *Telephone & Telegraph Co.*, 319 U. S. 50, 60; *Labor Board* v. *Nevada Copper Co.*, 316 U. S. 105, 106-7; *Elastic Stop Nut Corp.* v. *N. L. R. B.*, 8 Cir., 142 F. 2d 371, 380. Courts of Appeals can not search "for evidence to support other conflicting inferences and conclusions which the judges or the litigants may consider more reasonable or desirable." *Commissioner* v. *Scottish American Inv. Co.*, —— U. S. —— (decided December 4, 1944). Compare *Dobson* v. *Commissioner*, 320 U. S. 489, 501.

A voluntary wage increase without collective bargaining when the employees are organized and have selected a bargaining agent may be found to be an unfair labor practice. *N. L. R. B.* v. *Christian Board of Publication*, 8 Cir., 113 F. 2d 678, 681, 683; *Wilson & Co., Inc.*, v. *N. L. R. B.*, 8 Cir., 115 F. 2d 759, 763; *Singer Mfg. Co.* v. *N. L. R. B.*, 7 Cir., 119 F. 2d 131, 136, cert. den. 313 U. S. 595; *N. L. R. B.* v. *Barrett Co.*, 7 Cir., 135 F. 2d 959, 961; *Great Southern Trucking Co.* v. *N. L. R. B.*, 4 Cir., 127 F. 2d 180, 186, cert. den. 317 U. S. 652. Such unilateral action on the part of an employer is evidence of an intentional disregard of the National Labor Relations Act; and, in this case, it sustains

the inference and conclusion of the Board that such action undermined the union among the employees for whom it had been certified as bargaining representative and discouraged employees generally in their union affiliation.

The order of the Board will be enforced.

[fol. 63] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

[Title omitted]

RESPONDENT'S PETITION FOR REHEARING—Filed January 4, 1945

The Respondent, May Department Stores Company, doing business as Famous-Barr Company, respectfully submits this, its Petition for Rehearing, pursuant to Rule 15 of this Court, and states that, as shown by the Opinion of the Court, the Court has inadvertently overlooked material matters of law and fact, as follows:

[fol. 64] I

Under the law as stated in the Opinion and the facts shown by the record, Paragraph 1(b) of the Board's Order is too broad.

The Opinion of the Court concludes with the following unqualified language:

"The order of the Board will be enforced."

The use of such language in the Opinion shows that the Court has inadvertently overlooked the material matter of law that Paragraph 1(b) of the Board's Order is too broad. It is as follows:

> "1(b) In *any other manner* interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act." (Emphasis supplied.)

There is nothing in the record and nothing in the Opinion of the Court which, under the law, supports the broad language contained in the above quoted paragraph of the Board's Order.

The Court's Opinion states:

> "The Board is without power to restrain generally unlawful practices not found to exist or to be related to proven unlawful conduct, but the Board is free to restrain all unfair labor practices found to exist. National Labor Relations Board v. Express Publishing Company, 312 U. S. 426."

The Opinion of the Court then states that the Board had found, and the Court sustained the Board's finding, that [fol. 65] the Respondent took steps unilaterally to secure the approval of the National War Labor Board of a salary increase for approximately 4530 employees in its St. Louis store, including the approximately 30 employees in the unit involved in this case, and that such action of the Respondent was an unfair labor practice. The Opinion then states:

> "This is the type of unfair labor practice sought to be restrained by paragraph 1 (b) of the order."

Assuming that Respondent's action in filing the application with the National War Labor Board for approval of the store-wide increase was, in so far as it related to the approximately 30 employees involved in this case, an unfair labor practice, nevertheless the Board may not, under the law, restrain generally unfair practices not found to exist or to be related to the proven unfair practice, as the Board has attempted to do in Paragraph 1 (b) of its order.

The only case which has been cited by the Board, and the only case of which we have any knowledge, in which a Court has discussed language of an Order of the Board as broad as that contained in Paragraph 1 (b) of this Order and enforced such order as written by the Board, is the case of National Labor Relations Board v. Bradley Lumber Co., 128 Fed. 768 (CCA 8), decided by this Court on June 26, 1942. In that case similar language was considered by the Court and enforced, but only on a record which the Court described as follows:

> *"Were it not for the fact that this is not the first controversy which the respondent has had with the*

Board relative to violations of the Act, we would think that the part of the order in question should be modified or eliminated. The record indicates that twice in the past, in order to settle controversies with the [fol. 66] Board over alleged violations of the Act, the respondent has reinstated and paid back-wages to employees alleged to have been discriminatorily discharged, and that it was once required to disestablish an alleged 'company union.' *Respondent apparently has a background of anti-union activity which lends force to the Board's contention that it has reason to believe that other unrelated violations of the Act will be likely to occur unless enjoined.*

"'To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past.' National Labor Relations Board v. Express Publishing Co., supra, page 437 of 312 U. S., page 700 of 61 S. Ct., 85 L. Ed. 930. Such an order is apparently justified where the record discloses 'persistent attempts by varying methods to interfere with the right of self-organization in circumstances from which the Board * * * found or could have found the threat of continuing and varying efforts to attain the same end in the future.' National Labor Relations Board v. Express Publishing Co., supra, page 438 of 312 U. S., page 700 of 61 S. Ct., 85 L. Ed. 930." (Emphasis supplied.)

In the case here the Board has made no "contention that it has reason to believe that other unrelated violations of the Act will be likely to occur unless enjoined." And the record in this case would not support any such contention if it had been made. *The Board has found, and the Court has sustained it, that the Respondent engaged in unfair labor practices only to the extent of contesting in this Court the Board's certification of this union. No other unfair labor practice was shown or claimed.* The Board found, and the Court sustained it, that there were two unfair labor practices involved in Respondent's contesting this case in this Court. One was the refusal to bargain and the other [fol. 67] the failure to bargain with relation to the applica-

tion for the store-wide salary increase. Under the National Labor Relations Act, Section 9, the Board's certification of the union could not be contested in court except by the Company's refusal to bargain and the entry of a cease and desist order which could be made the subject of review by the Court under Section 10 of the National Labor Relations Act.

In the case of American Federation of Labor v. National Labor Relations Board, 308 U. S. 401, 409, 84 L. Ed. 347, 352, the United States Supreme Court said:

> "Here it is evident that the entire structure of the Act emphasizes, for purposes of review, the distinction between an 'order' of the Board restraining an unfair labor practice and a certification in representation proceedings. The one authorized by § 10 may be reviewed by the court on petition of the Board for enforcement of the order, or of a person aggrieved, in conformity to the procedure laid down in § 10, which says nothing of certifications. The other, authorized by § 9, is nowhere spoken of as an order, and no procedure is prescribed for its review apart from an order prohibiting an unfair labor practice. The exclusion of representation proceedings from the review secured by the provisions of § 10 (f) is emphasized by the clauses of § 9 (d), which provide for certification by the Board of a record of a representation proceeding only in the case when there is a petition for review of an order of the Board restraining an unfair labor practice. *The statute on its face thus indicates a purpose to limit the review afforded by § 10 to orders of the Board prohibiting unfair labor practices*, a purpose and a construction which its legislative history confirms." (Emphasis supplied.)

Hence, with reference to the refusal to bargain, the Respondent's unfair labor practice was only the practice which it was required to follow to obtain a judicial review of the Board's Order.

[fol. 68] With reference to the other alleged unfair labor practice, the failure of the Respondent to bargain for a salary increase to all its employees with the union which had been certified as bargaining agent for approximately 30 people, the record shows that the Respondent submitted all the facts to the War Labor Board and expressed its

willingness to have the 30 employees included or, if the union should object to their inclusion, to have them excluded. Here, also, there was shown no more than the Respondent's failure to accept the certification by the Board pending a judicial review of that certification under Section 10 of the National Labor Relations Act, for if the Company had recognized the union and bargained with it, the propriety of the certification would have been a moot question and there would have been nothing for review by the Court.

Of the five cases mentioned in the Opinion as holding that a voluntary wage increase without collective bargaining may be an unfair labor practice, if the employees are organized, the case of N. L. R. B. v. Christian Board of Publication, 113 Fed. (2d) 678 (C. C. A. 8), held that the wage increase under the circumstances of that case was evidence of the company's domination of an independent union. In the other four cases, Wilson & Co., Inc., v. N. L. R. B., 115 Fed. (2d) 759 (C. C. A. 8); Singer Mfg. Co. v. N. L. R. B., 119 Fed. (2d) 131 (C. C. A. 7); N. L. R. B. v. Barrett Co., 135 Fed. (2d) 959 (C. C. A. 7); and Great Southern Trucking Co. v. N. L. R. B., 127 Fed. (2d) 180 (C. C. A. 4); it was held that the wage increase involved in each case was evidence of the company's refusal to bargain.

Assuming, however, that two distinct unfair labor practices—(1) refusal to bargain, and (2) failure to bargain for the store-wide salary increase—have been found by the Board and sustained by the Court, there is still no justification for the broad language contained in Para- [fol. 69] graph 1 (b) of the Board's Order. In the case of National Labor Relations Board v. Swift & Co., 129 Fed. (2d) 222 (C. C. A. 8), decided by this Court on July 10, 1942 (after the decision in the Bradley Lumber Co. case) the Court said:

> "The respondent resists the entry of a decree enforcing paragraph 1 (c) of the order on the ground that this provision is broader than the issue. This paragraph directs the respondent to cease and desist from 'In any other manner interfering with * * * its employees,' etc. This identical provision was criticized and condemned by the Supreme Court in National Labor Relations Board v. Express Publishing Com-

pany, 312 U. S. 426, 437, 61 S. Ct. 693, 700, 85 L. Ed. 930, and by this Court in Wilson & Co. v. National Labor Relations Board, supra, 123 F. 2d), at page 419. In the Express Publishing Company case, supra, the court said, 'To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past.' *There must be some evidence in the record to support the inference that the employer has violated the Act in ways similar to the conduct of which it is found to be guilty, or evidence indicating some danger that it will commit such acts in the future, to justify so broad an injunction.* See National Labor Relations Board v. Bradley Lumber Company, supra. Our attention is not called to any evidence of such character in the record before us, and we find none. In the decree to be entered herein paragraph 1 (c) will be eliminated." (Emphasis supplied.)

In that case the Court found that the Respondent had engaged in unfair labor practices in (1) dominating an independent union, (2) discouraging membership in the A. F. of L., (3) refusing to employ Rosemary Rogers in violation of Section 8 (3) of N. L. R. A., and (4) dis- [fol. 70] charging Elnora Tibbitt in violation of Section 8 (3). In spite of these numerous unfair labor practices, this Court found that the broad language used by the Board, similar to the language of Paragraph 1 (b) of the Order involved here, was too broad and ordered that it be eliminated. In the light of that decision by this Court, we feel certain that the unqualified language of the Opinion in the case involved here that the Order of the Board, including Paragraph 1 (b), will be enforced, was used because the Court inadvertently overlooked the broad provisions of that paragraph. Here the two alleged unfair labor practices, if there be two, both arose because the Company sought a judicial review of the Board's Order, and certainly the broad language contained in Paragraph 1 (b) of the Order is not justified.

In the case of National Labor Relations Board v. Mason, 126 Fed. (2d) 810 (C. C. A. 9), the Court sustained the Board's finding that the respondent had engaged in un-

fair labor practices in discharging eleven employees in violation of Section 8 (3) of the Act, but it ordered the elimination of language similar to that contained in Paragraph 1 (b) of the Order under review here.

In the case of American Smelting & Refining Co. v. National Labor Relations Board, 126 Fed. (2d) 630 (C. C. A. 8), this Court sustained the Board's order finding that the company had dominated an independent union and had discouraged membership in a C. I. O. union, but the Court ordered the elimination from the Board's order of language similar to that contained in Paragraph 1 (b) of the Order under review here.

In the case of Wilson v. National Labor Relations Board, 123 Fed. (2d) 411 (C. C. A. 8), this Court sustained the Board's order finding that the company had engaged in unfair labor practices in dominating an independent union and in discharging numerous employees in violation of [fol. 71] Section 8 (3) of the Act, but the Court ordered the elimination from the Board's Order of a paragraph similar to Paragraph 1 (b) of the Order under review here.

In the case of Singer Mfg. Co. v. National Labor Relations Board, 119 Fed. (2d) 131 (C. C. A. 7), the Court sustained the Board's finding that the company had refused to bargain with the union and also found that the company had given wage increases to the employees while refusing to bargain with the union. The facts in that case are not similar to the facts involved here, because there the company was not seeking a judicial review of the Board's order but was meeting with the union and not bargaining in good faith, as the Board found. However, the two alleged unfair labor practices of which complaint is made here, refusal to bargain and granting a unilateral wage increase, were present in the Singer Manufacturing Company case and there the Court ordered the elimination from the Board's order of language similar to the language contained in Paragraph 1 (b) of the Order under review here.

As noted in the Opinion, the United States Supreme Court has held in the case of National Labor Relations Board v. Express Publishing Co., 312 U. S. 426, that the Board is without power to restrain generally unfair labor practices not found to exist or to be related to proven unfair labor practices.

It is respectfully submitted that under the law Paragraph 1 (b) of the Board's Order should be eliminated or, at least, so modified that it will relate only to the acts of which complaint was made and not to all conceivable acts which the Board might consider to be in violation of rights guaranteed to employees by Section 7 of the National Labor Relations Act.

[fol. 72] II

The Court has inadvertently overlooked facts in the record which show that Respondent acted in good faith in filing its application for approval of a store-wide salary increase.

(a) The Court has inadvertently overlooked the fact that Respondent had no knowledge of the charge filed by the union at the time Respondent's Vice President on September 11, 1943, said to the employees: "We sincerely hope that nothing will occur which will delay or obstruct or prevent this approval." Although the charge was filed with the Board on September 3, 1943 (Rec. p. 29), as stated in the Opinion, the Respondent was not advised of it until September 23, 1943, when the Board issued its Complaint and Notice of Hearing (Rec. pp. 35 and 36).

At the oral argument of this case the Board sought to draw an unfavorable inference from the above quoted language used by Mr. Salomon, the Respondent's Vice President, and to imply that Mr. Salomon was referring to the charge filed by the union when he stated that he hoped nothing would delay or obstruct or prevent approval of the salary increase application. The Court in its Opinion refers to the "chronology of these events" as tending to support the Board's finding that the Respondent's conduct was an unfair labor practice. The Court inadvertently overlooked the fact that neither the Respondent nor the employees knew that the union's charge had been filed at the time Mr. Salomon used the language quoted above.

None of the announcements made by Respondent relating to the store-wide salary increase contained any reference to the employees in Departments 280 and 281. We submit that it is unfair to the Respondent to permit the Board to choose only certain language used by Mr. Salomon and to draw an unfavorable inference from that language, when the Board could have introduced Mr. Salo-

mon's remarks in full. In the Appendix to Respondent's [fol. 73] Brief, pages 181 and 182, it is shown that the Board's Trial Attorney offered in evidence only those portions of Mr. Salomon's remarks which were quoted in the Opinion. The Board's Trial Attorney omitted to read into the record the remainder of those remarks which would have explained the reason for the language used by Mr. Salomon. Then in this Court for the first time the Board seeks to infer that the reference was to the charge filed by the union. The remainder of the speech which the Board could have introduced would have shown to what Mr. Salomon was referring, but the Board chose not to offer that part of the remarks.

In any event, the record in this case shows that notice of the filing of the charge was not given to the Respondent until September 23, long after Mr. Salomon's remarks were made.

(b) The Court has also inadvertently overlooked the fact that the Respondent disclosed fully to the National War Labor Board all the facts, including the fact that the union had been certified for the employees of Departments 280 and 281 and that it was Respondent's intention to contest the certification in the Court (Resp. App. p. 188). The regulations of the War Labor Board at that time required only that an applicant supply the names of unions which had been *recognized* (later the regulations were amended to include unions which had been *certified*). But the Respondent made full disclosure of all the facts so that the War Labor Board could deal with the situation with exact knowledge of the rights of all parties.

The Union did not represent the 4,500 other employees of the Respondent's store who were entitled to receive this store-wide salary increase. There certainly would have been a claim of discrimination if the Respondent had applied for approval of the increase for all the employees except the employees in Departments 280 and 281. Therefore, the Respondent placed the entire situation, with all the facts, before the National War Labor Board and stated [fol. 74] its willingness to have the employees of Departments 280 and 281, either included or excluded. Certainly that position should not furnish any basis for a charge of bad faith.

The Board claims that the Respondent did not act in good faith because it did not bargain with the union for Departments 280 and 281 before filing the application for the store-wide salary increase, but Section 10 of the National Labor Relations Act gives to the employer the right to obtain judicial review of the Board's orders. It is said that the certification was valid when issued and although subject to review, it could not be disregarded pending a review. *The difficulty with this position is that the certification cannot be reviewed in any other way than by refusing to comply with it.* (American Federation of Labor v. National Labor Relations Board, 308 U. S. 401, 409, 84 L. Ed. 347, 352.) We think it is logical to say that if a party seeks a review of a Board's order and is unsuccessful, then he must be responsible for the consequences which necessarily flow from his action in seeking the review. But certainly it is not logical to say that under such circumstances the party should be charged with bad faith in asking a judicial review of a Board's order when the statute grants that right.

Nor can it be said that the Respondent's position in this case was without merit. The Board had held, on December 24, 1942, that a store-wide unit was the appropriate unit in this store (Resp. App. pp. 162-167). The union had announced publicly that it intended to continue to organize the whole store but was going to seek certification bit by bit, one or two departments at a time (Resp. App. pp. 133, 137), contrary to the Board's decisions in many cases, including Matter of Arlington Mills Co., 31 N. L. R. B. 21, to avoid the effect of which the Union filed the petition in this case in the name of the St. Louis Joint Council (Rec. p. 3), although none of the employees were members of that [fol. 75] organization (Resp. App. p. 86). The Board had held in the J. L. Brandeis & Sons case, 47 N. L. R. B. 614, that a unit composed of employees engaged in the alteration of men's, women's and boys' clothing was appropriate and in a case in this Respondent's Denver store, 39 N. L. R. B. 471, the Board had refused to separate seamstresses, furriers and tailors. Even in this case, in the representation decision, the Board had said that there was a high degree of similarity in the work performed by these various groups of employees (Rec. p. 13). We submit that the Respondent was entitled under the law to seek judicial review of the Board's order. Also at that time the question of jurisdic-

tion of the N. L. R. B. over a department store had not yet been settled by the decision of this Court in the Brandeis case, No. 12,782, 142 Fed. (2d) 977, and the United States Supreme Court had not yet passed on the J. L. Hudson Co. case, 320 U. S. 740. So that the question of the Board's jurisdiction was an open question at that time.

CONCLUSION

Because of the said material matters of law and fact which were inadvertently overlooked by the Court, as shown by the Opinion in this case, the Respondent respectfully prays that it be granted a rehearing and that, in any event, Section 1 (b) of the Board's order should be eliminated or, at least, modified so that it will be limited to the unfair labor practice found by the Board.

Respectfully submitted, Lewis, Rice, Tucker, Allen & Chubb; Robert T. Burch; Milton H. Tucker, 208 North Broadway, St. Louis, Missouri, Counsel for Respondent.

[fol. 76] CERTIFICATE

We hereby certify that the foregoing Petition for Rehearing is filed in good faith and that we believe it to be meritorious.

Robert T. Burch, Milton H. Tucker, 208 North Broadway, St. Louis, Missouri, Counsel for Respondent.

[File endorsement omitted.]

[fol. 77] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER MODIFYING ORDER OF NATIONAL LABOR RELATIONS BOARD AND DENYING PETITION OF RESPONDENT FOR REHEARING—January 11, 1945

Since the unfair labor practices found by the Board to exist related only to the employees in the busheling rooms and not to the other employees in the store of respondent paragraph 1(b) of the order of the National Labor Relations Board is too broad. This paragraph will be, and is by the Court hereby, modified to read as follows:

"(b) In any other manner interfering with, restraining, or coercing its employees who are referred to in

paragraph 1 (a) in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act."

And as so modified the order of the Board will be enforced. The petition for rehearing filed by respondent is denied.

[fol. 78] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, JANUARY TERM, A. D. 1945

No. 12840

NATIONAL LABOR RELATIONS BOARD, Petitioner,

vs.

MAY DEPARTMENT STORES COMPANY, Doing Business as Famous-Barr Company, Respondent

DECREE—January 11, 1945

On Petition for Enforcement of Order of National Labor Relations Board

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its decision and order dated December 17, 1943. The Court, on November 16, 1944, heard arguments of respective counsel, and has considered the briefs of the parties. On December 20, 1944, the Court, being fully advised in the premises, handed down its decision enforcing the said order. In conformity therewith, it is hereby

Ordered, Adjudged, and Decreed that May Department Stores Company, doing business as Famous-Barr Company, St. Louis, Missouri, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with St. Louis Joint Council, United Retail & Department Store Employees of America, affiliated with the Congress of Industrial Or-

ganizations, as the exclusive representative of all its employees at its St. Louis store engaged in the busheling room, second floor, department 280, and in the busheling room, [fol. 79] basement, department 281, including regular extra employees in these departments, but excluding the two foremen and all other employees of the respondent;

(b) In any other manner interfering with, restraining, or coercing its employees who are referred to in paragraph 1(a) in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with St. Louis Joint Council, United Retail & Department Store Employees of America, affiliated with the Congress of Industrial Organizations, as the exclusive representative of all its employees at its St. Louis store engaged in the busheling room, second floor, department 280, and in the busheling room, basement, department 281, including regular extra employees in these departments, but excluding the two foremen and all other employees of the respondent, with respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Post immediately in conspicuous places at its St. Louis, Missouri, store, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1(a) and (b) of this Decree; and [fol. 80] (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) of this Decree;

(c) Notify the Regional Director for the Fourteenth Region of the National Labor Relations Board in writing, within ten (10) days from the date of the issuance of a certified copy of this Decree, what steps the respondent has taken to comply herewith.

[fol. 81] IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION OF RESPONDENT FOR STAY OF MANDATE OR OTHER PROCESS—Filed January 20, 1945

Comes now The May Department Stores Company, doing business as Famous-Barr Company, the Respondent in the above entitled cause, and shows the Court that the Respondent considers the judgment and decree of the Court entered on January 11, 1945, to be erroneous and in conflict with decisions of the Supreme Court of the United States and decisions of other Circuit Courts of Appeals and that, in the time and manner provided by 28 U. S. C. A. Section 350, Respondent will file in the Supreme Court of the United States a petition for a writ of certiorari in the above entitled cause.

Wherefore, Respondent prays that the mandate or other process in the above entitled cause may be stayed pending the filing of such petition for certiorari by the Respondent in the Supreme Court of the United States and pending the decision of the Supreme Court on the said petition for certiorari.

Respectfully submitted, Lewis, Rice, Tucker, Allen & Chubb, Robert T. Burch, Milton H. Tucker, Attorneys for Respondent.

[File endorsement omitted.]

[fol. 82] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING COMPLIANCE WITH DECREE—January 23, 1945

In this matter counsel for the respondent has filed a petition for stay of mandate or other process pending the filing of a petition for writ of certiorari in the Supreme Court of the United States. The decree of this Court was entered January 11, 1945, immediately upon entry of order by this Court modifying the order of the Labor Board upon petition for rehearing and upon the denial of said petition for rehearing. A certified copy of the Decree was issued to the respondent by sending same to its counsel in this Court and said decree required that the respondent notify the Regional Director within ten days from the date of the issuance of

certified copy of the decree, what steps the respondent has taken to comply therewith.

On Consideration of the petition for stay, compliance with the decree of this Court may be, and is hereby, postponed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the compliance postponement or stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

[fol. 83] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 84] Supreme Court of the United States

Order Allowing Certiorari—Filed April 9, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 85] In the Supreme Court of the United States

Stipulation as to Printing Record—Filed May 25, 1945

It is hereby stipulated and agreed by and between the parties hereto, in accordance with the provisions of Paragraph 8 of Rule 38 of this Court, that the following portions of the Transcript of the Record in the United States Circuit Court of Appeals, Eighth Circuit, which was filed herein with the Petition for Writ of Certiorari, may be omitted from the record which is to be reprinted under the supervision of the Clerk of this Court, to wit:

(1) Folios 5 and 6, being Board's Exhibit 1-b and Board's Exhibit 1-c, in case number 14-R-588, contained in Volume 1, pages 5 to 7.

(2) Folio 42, being Board's Exhibit 1-e in case number 14-C-872, contained in Volume 1, pages 36 to 38.

(3) Folios 52, 53 and 54, being Order transferring case number 14-C-872 to the National Labor Relations Board, and Application of Counsel for Respondent for Extension of time to file Exceptions and Brief, and Telegram extending time to file Exceptions and Brief, contained in Volume 1, pages 40 and 41.

[fol. 86] (4) Folios 434 to 441, inclusive, being Intervener's Exhibits 1, 2, 3 and 4, contained in Volume 2, pages 89 to 107, inclusive.

(5) Folios 444 to 449, inclusive, being Intervener's Exhibits 6, 7 and 8, inclusive, contained in Volume 2, pages 113 to 123, inclusive.

(6) Folios 452 and 453, being Intervener's Exhibit 10, contained in Volume 2, pages 129 to 131, inclusive.

(7) Folios 458 to 461, inclusive, being Intervener's Exhibits 13 and 14, contained in Volume 2, pages 141 to 149 inclusive.

(8) Folios 464 and 465, being Intervener's Exhibit 16, contained in Volume 2, pages 155 to 157, inclusive.

(9) Folios 23 and 24, being stipulation commencing with the words "(23) Mr. Hackler. At this time I am prepared to read a", and ending with the words "designation of the St. Louis store", contained in Volume 3, pages 1 to 2.

Lyle M. Allen, R. Walston Chubb, Attorneys for Petitioner. Hugh B. Cox, Acting Solicitor General. 5/25/45.

Endorsed on cover: File No. 49,424, U. S. Circuit Court of Appeals, Eighth Circuit, Term No. 39. May Department Stores Company, doing business as Famous-Barr Company, Petitioner, v. National Labor Relations Board. Petition for a writ of certiorari and exhibit thereto. Filed February 21, 1945. Term No. 39, O. T., 1945.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

MAY DEPARTMENT STORES COMPANY, Doing Business as FAMOUS-BARR COMPANY,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD.

No. 971 39

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals,
Eighth Circuit,

and

BRIEF IN SUPPORT THEREOF.

LYLE M. ALLEN,
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Attorneys for Petitioner.

MILTON H. TUCKER,
ROBERT T. BURCH,
Of Counsel.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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A. Paragraph 1 (b) of the Board's order, as modified by the Court and ordered enforced as so modified, is a blanket order restraining the Company generally from violating Section 7 of the National Labor Relations Act. This order is too broad. The decision of the Circuit Court of Appeals, Eighth Circuit, enforcing that portion of the order is in conflict with an applicable decision of this Court and is in conflict with decisions of other Circuit Courts of Appeals on the same question and is erroneous. Nothing in the record in this case justifies such a blanket order	17

B. The filing and announcement of the Company's application for approval by the National War Labor Board of the general salary increase for substantially all the Company's employees was not an unfair labor practice under the law. The decision by the Court below that such conduct by the Company was an unfair labor practice is in conflict with an applicable decision of this Court and is in conflict with the decision of another Court of Appeals on the same question and is erroneous 25

C. The certification of the Joint Council by the Board was invalid because the Board's finding that the Joint Council had substantial membership among the employees involved was not supported by any evidence, and the Board's action in placing the name of the Joint Council on the ballot was a representation to the employees that the Joint Council did have such membership, and the Board's action in certifying the Joint Council and in ordering the Company to bargain with it was arbitrary, unreasonable and capricious 31

D. The Board's determination in this case of the unit as appropriate for the purposes of collective bargaining was arbitrary, unreasonable and capricious and cast an undue and unreasonable burden upon the Company 35

Conclusion 42

Cases Cited.

American Federation of Labor v. National Labor Relations Board, 308 U. S. 401, 409, 84 L. Ed. 347, 352 . . 20, 30

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

MAY DEPARTMENT STORES COMPANY, Doing Business as FAMOUS-BARR COMPANY, Petitioner, vs. NATIONAL LABOR RELATIONS BOARD.	No.....

PETITION FOR WRIT OF CERTIORARI

To the Honorable Harlan F. Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows as follows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The Proceedings.

This case was commenced by the National Labor Relations Board (hereinafter called "Board"), which filed in the United States Circuit Court of Appeals, Eighth Circuit, pursuant to Section 10 (e) of the National Labor Relations Act, 29 USCA, Section 160 (e), its petition for

enforcement of an order entered by the Board on December 17, 1943 (Tr. pp. 1-[64-67])[1]. The said order directed your petitioner (hereinafter called the "Company") to cease and desist from refusing to bargain collectively with St. Louis Joint Council, United Retail and Department Store Employees of America, CIO (hereinafter called "Joint Council"), as exclusive representative of the Company's employees at its St. Louis store in two departments, called busheling rooms, engaged in altering men's clothing, and affirmatively ordered the Company to bargain collectively with the Joint Council as the representative of said employees. Said order, in paragraph 1 (b) thereof, also directed the Company to cease and desist from

> "(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act."

and said order provided for the posting of notices and reporting compliance to the Board by the Company (Tr. pp. 1-[53-54]).

Pursuant to Section 9 (d) of the National Labor Relations Act, the transcript filed by the Board in the Circuit Court of Appeals included the record of proceedings and the certification issued by the Board on a petition filed by the Joint Council for investigation and certification of representatives. In said proceedings the American Federation of Labor, which has conducted a rival campaign to

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1 In accordance with paragraph 7 of Rule 38 of this Court the record as printed below with the proceedings and opinion in that court have been filed here. Citations to pages of a printed volume in the record are shown by the number which appears on the volume followed by the numbers, in brackets, of the pages of the volume where the particular matter appears.

organize all the employees of the Company's store in a storewide unit, intervened and opposed the petition filed by the Joint Council (Tr. pp. 1-[7-9]).

The Company considered the said certification issued by the Board to be invalid and so notified the Joint Council. Thereafter the Board issued its complaint and alleged that the Company had engaged in unfair labor practices within the meaning of Section 8, subsections (1) and (5) of the National Labor Relations Act, in that it had refused to bargain with the Joint Council and also had taken steps unilaterally to obtain approval by the National War Labor Board of a wage increase for the employees within the said unit (Tr. pp. 1-[31-35]). The Company filed its answer to the complaint and admitted that it had refused to bargain with the Joint Council but denied the other allegations (Tr. p. 1-[38]). The Board thereafter issued its order mentioned above, and filed in the Circuit Court of Appeals its petition for enforcement of its said order. The Company answered the Board's petition and denied the validity of the certification and the order requiring the Company to bargain with the Joint Council and further denied the validity of paragraph 1 (b) of the order, which directed the Company to cease and desist from in any other manner engaging in any unfair labor practices prohibited by Section 8 (1) of the National Labor Relations Act and denied that it had engaged in any unfair labor practice within the meaning of said Act (Tr. pp. 1-[68-75]).

The United States Circuit Court of Appeals, Eighth Circuit, filed its opinion on December 20, 1944, in which it concluded as follows:

> "The order of the Board will be enforced" (Tr. p. 18).

The Company filed its petition for rehearing (Tr. pp. 19-32) on January 4, 1945, and thereafter, on January 11,

1945, said Circuit Court of Appeals entered an order denying the Company's petition for rehearing but modifying the order of the National Labor Relations Board so that paragraph 1 (b) of said order was made to read as follows:

> "(b) In any other manner interfering with, restraining, or coercing its employees **who are referred to in paragraph 1 (a)** in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the National Labor Relations Act." (Emphasis supplied to show addition.)

and the Court ordered that the order of the Board as so modified will be enforced (Tr. p. 33). The employees referred to in paragraph 1 (a) of the Order are the employees in the said two departments known as busheling rooms (Tr. p. 34).

The Unit.

There are only 30 to 40 employees in these two departments (Tr. pp. 1-[4, 27]). The Company operates a department store in St. Louis, Missouri, in which it utilizes a main store building, three warehouses, and a customers' garage. Its functions are divided into more than 350 departments (Tr. p. 2-[165]). It has approximately 5,000 employees (Tr. p. 1-[4]). The 30 to 40 employees involved in this case make the alterations on men's and boys' clothing sold in the clothing departments of the store. Department 280 is on the second floor balcony and is under the management of the manager of the men's clothing department (Tr. pp. 2-[12-13]), and Department 281 is in the basement and is under the management of the manager of the basement men's clothing department (Tr. pp. 2-[40-42]).

There is a single personnel director for the entire store and there are identical regulations with reference to employment, transfer, promotion, salary increases, lay-offs, discharges, discipline, leaves of absence, vacations, admissions to the building, pay roll computations, sick leave pay, advances on salary, discounts, year-end bonuses, rules for the guidance of employees, group life insurance, group hospital insurance, welfare association membership, charge accounts, rest rooms, locker rooms, lunch rooms, hospital and library (Tr. p. 2-[77]).

No charge is made for alterations in the busheling departments (except for very infrequent occasions in special sales of men's clothing in the basement). The busheling departments are maintained for the purpose of fitting clothing sold in the men's and boys' clothing departments and for no other purpose (Tr. p. 2-[77]). Although the evidence showed that some degree of skill is required for work in the busheling rooms, this same skill is required for work in other alteration departments where women's clothing is altered and where fur garments are altered (Tr. pp. 2-[62-63]).

The Joint Council.

Although the Board stated in its Decision and Direction of Election that the Joint Council had membership, and presumably substantial membership, in the unit (Tr. p. 1-[11]), and the name of the Joint Council was the only name on the ballot (Tr. p. 1-[27]), the record shows that it had no membership in the unit and had not been designated by any employee (Tr. p. 2-[86]) but it had only an indefinite relationship (Tr. pp. 2-[37-38]) with a local union in which a number of the employees were members (Tr. p. 2-[86]).

The Application for Approval of a General Salary Increase.

On August 31, 1943, the Company filed with the National War Labor Board applications for approval of a general salary increase of $2 per week to practically all its employees (Bd. Ex. 9, Tr. pp. 2-[187-201]). One of these applications covered the employees of the Spring Avenue Warehouse and the other covered the employees of the store, the St. Charles Street Warehouse, and the Patrons' Garage (Tr. pp. 2-[187-188]). This latter application sought approval for the increase to all employees who were subject to the jurisdiction of the National War Labor Board, except the electricians, carpenters, painters and plasterers, who were craftsmen covered by collective bargaining contracts or working arrangements with their unions (Tr. pp. 2-[193-194]). No specific mention was made in the application of the employees in the busheling rooms, but in the letter by which the applications were transmitted to the War Labor Board (Tr. pp. 2-[187-188]), the Company stated all the facts relating to the certification of the Joint Council as representative of these employees and that the Company was contesting this certification, that it was the Company's intention that the employees in these departments should be included in the application, but, if the Joint Council should object to their inclusion, then they might be excluded.

Immediately after August 31, 1943, the Company announced to its employees that the applications had been filed. No specific mention was made of the employees in the busheling rooms (Bd. Exs. 10 and 11, Tr. pp. 2-[181-182, 201-203]). No action had been taken on the applications at the time of the hearing.

No Other Claimed Unfair Labor Practices.

The refusal of the Company to recognize the Joint Council, pending court review of the Board's decision, and the filing and announcement of the application for the general salary increase are the only acts claimed to have been unfair labor practices engaged in by the Company.

II.

JURISDICTION.

The basis upon which it is contended that this Court has jurisdiction to review the decree in question is as follows:

Section 240 of the Judicial Code, as amended, 28 USCA, Sec. 347, provides that in any case in a Circuit Court of Appeals it shall be competent for this Court, upon the petition of any party thereto, to require by certiorari that the cause be certified to this Court for determination here with the same power and authority, and with like effect, as if the cause had been brought here by unrestricted writ of error or appeal.

Section 10 (e) of the National Labor Relations Act, 29 USCA, Sec. 160 (e), provides that the Board shall have power to petition any Circuit Court of Appeals within any circuit wherein the respondent transacts business for the enforcement of its orders entered as provided in Section 10 of said Act and that the jurisdiction of the Circuit Court of Appeals shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by this Court upon writ of certiorari or certification.

The decree of the United States Circuit Court of Appeals, Eighth Circuit, sought to be reviewed here, was entered on the 11th day of January, 1945 (Tr. p. 33).

III.

THE QUESTIONS PRESENTED.

This case presents the following questions:

(a) Whether the order of the Board, as modified by the Court, and enforced by the Court, as so modified, directing the Company to cease and desist from

> "in any other manner interfering with, restraining, or coercing its employees who are referred to in paragraph 1 (a) in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act,"

is not too broad, where the Company is not claimed to have engaged in any unfair labor practices, except the refusal to bargain while the certification of the Board was being reviewed by the Court and the filing and announcement of the application to the National War Labor Board for approval of a $2 per week general salary increase for substantially all the Company's employees, more than 4500, in which application the Company was willing to have the 30 to 40 employees involved in the contested certification either included or excluded as desired by the Joint Council.

(b) Whether or not it was an unfair labor practice for the Company to file with the National War Labor Board an application for approval of the $2 per week general salary increase for substantially all its employees and to state all the facts to the War Labor Board and state that it was willing to include in the increase the 30 to 40 employees in the unit for which the Joint Council had been certified by the Board, which certification the Com-

pany had announced it would contest in the courts, or was willing to exclude those employees if the Joint Council objected, and to announce to the employees the filing of such application without any specific mention of the employees in the said certified unit.

(c) Whether or not the National Labor Relations Board may place the name of an organization on the ballot and, as a result of the election, certify that organization as exclusive bargaining agent for a unit where said organization has no membership among the employees involved and none have designated it as representative, but it has only some indefinite relationship with a local union in which a number of the said employees are members.

(d) Whether or not the National Labor Relations Board may determine a unit consisting of 30 to 40 employees in two separate departments out of more than 350 departments in a department store to be appropriate, where those employees have some degree of skill, but the skill is not different from that required for work in other similar departments and where rival unions are conducting store-wide organizing campaigns (Tr. p. 1-[7-9]) and the petitioning union claims to have substantial membership throughout the store (Tr. p. 2-[11]) and has publicly announced its intention to organize the entire store by a series of election petitions and has stated:

> "Where we will petition next depends upon only one thing. That is which group is ready next" (Tr. p. 2-[139]).

IV.

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

A. The decision of the Circuit Court of Appeals, Eighth Circuit, is in conflict with the applicable decision of this Court in the case of **National Labor Relations Board v.**

Express Publishing Co., 312 U. S. 426, 85 L. Ed. 930, in that Section 1 (b) of the Board's order, as modified by the Circuit Court of Appeals, and enforced as so modified, is too broad and fails to state with reasonable specificity the acts which the Company is to refrain from doing, and it restrains the Company generally from other unlawful practices which it has neither found to have been pursued nor to be related to the proven conduct said to be unlawful. Said decision of the Circuit Court of Appeals enjoins other violations of the statute which bear no resemblance to that which the Company is claimed to have committed, and there is no finding or claim that danger of their commission in the future is to be anticipated from the course of the Company's conduct in the past.

B. The decision of the Circuit Court of Appeals, Eighth Circuit, is in conflict with the decisions of other Circuit Courts of Appeals on the same question in the cases of **National Labor Relations Board v. Mason Mfg. Co.** (CCA 9), 126 Fed. (2d) 810; **National Labor Relations Board v. Newark Morning Ledger Co.** (CCA 3), 120 Fed. (2d) 262; **Singer Mfg. Co. v. National Labor Relations Board** (CCA 7), 119 Fed. (2d) 131, and **National Labor Relations Board v. Swift & Co.** (CCA 7), 108 Fed. (2d) 988, in that Section 1 (b) of the Board's order, as modified by the Court, restraining generally all violations of Section 7 of the National Labor Relations Act, is too broad and is not limited to the disposition of the issues which were presented to the Board and to the Court and restrains acts not found to have been committed nor related to the acts found and as to which there is no basis for a claim of apprehension that they will be committed in the future.

C. The decision of the Circuit Court of Appeals is in conflict with the applicable decision of this Court in the case of **Medo Photo Supply Corp. v. National Labor Relations Board**, 321 U. S. 678, and in conflict with the decision

of another Court of Appeals on the same question in the case of **Peter J. Schweitzer, Inc., v. National Labor Relations Board** (App. D. C.), 144 Fed. (2d) 520, in that the opinion of the Circuit Court of Appeals, Eighth Circuit, holds that the application of the Company to the National War Labor Board for approval of a general salary increase to substantially all its employees was an unfair labor practice, although there was no suggestion that any employees should withdraw from the union in order to obtain the benefits of the increase.

D. The Circuit Court of Appeals, Eighth Circuit, has decided important questions of federal law which have not been, but should be, settled by this Court:

(1) One such question is whether the Board may place the name of an organization on the ballot and, as a result of the election, certify it as exclusive bargaining representative of employees, where said organization has no membership among the employees, and none have designated it as representative, but it has only some indefinite relationship to a local union which has a number of members in the unit; and

(2) Another such question is whether the Board may determine as appropriate a unit consisting of 30 to 40 employees in two out of three hundred and fifty departments in a department store where the employees in the two departments have some degree of skill, but not different from the skill employed in other departments doing the same kind of work and where two rival unions are conducting storewide organizing campaigns and the petitioning union claims to have substantial membership throughout the store and has announced publicly its intention to file a series of election petitions, and has stated:

> "Where we will petition next depends upon only one thing. That is which group is ready next."

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record, and of the proceedings of said Circuit Court of Appeals in the case numbered and entitled on its docket as No. 12,840, National Labor Relations Board, Petitioner, v. May Department Stores Company, doing business as Famous-Barr Company, Respondent, to the end that this case may be reviewed and determined by this Court as provided by the statutes of the United States, that the decree of said Circuit Court of Appeals be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated February 19, 1945.

THE MAY DEPARTMENT STORES COMPANY,

By LYLE M. ALLEN,
R. WALSTON CHUBB,
Attorneys for Petitioner.

MILTON H. TUCKER,
ROBERT T. BURCH,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

MAY DEPARTMENT STORES COMPANY, Doing Business as FAMOUS-BARR COMPANY, Petitioner, vs. NATIONAL LABOR RELATIONS BOARD.	}	No.....

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit appears at page 7 of the transcript, and the subsequent order of the said Court modifying the Board's order appears at page 33 of the transcript. The opinion is reported in 146 Fed. (2d) 66.

II.

JURISDICTION.

The Court's jurisdiction is invoked pursuant to the provisions of Section 240 of the Judicial Code, as amended, 28 USCA, Sec. 347; and Sec. 10-(e) of the National Labor

Relations Act, 29 USCA, Sec. 160 (e). The date of the decree entered by the Court below is January 11, 1945 (Tr. p. 33).

III.

STATEMENT OF THE CASE.

A statement of the case appears in the foregoing petition, which statement is hereby adopted and by reference made a part of this brief as the statement of the case.

IV.

SPECIFICATION OF ERRORS.

(1) The Court erred in ordering the enforcement of paragraph 1 (b) of the Board's Order, as modified by the Court, and in failing to order that said paragraph 1(b) of the Board's order be eliminated or, at least, modified so that it would be limited to the alleged unfair practice found by the Board.

(2) The Court erred in holding that the action of the Company in applying to the National War Labor Board for approval of a $2 per week general salary increase affecting the salaries of more than 4500 employees in its St. Louis store was an unfair labor practice, where the union did not claim to be the representative of the employees except the 30 to 40 employees in the two departments known as busheling rooms, and that claim was based upon a certification then being contested.

(3) The Court erred in holding that the action of the Company in applying to the National War Labor Board for approval of a general salary increase to substantially all its employees sustained the inference and conclusion of the Board that such action undermined the Joint Council among the 30 to 40 employees for whom it had been certified as bargaining representative, and discouraged

employees generally in their union affiliation, where there was no suggestion that any employees should withdraw from the union in order to obtain the benefits of the salary increase.

(4) The Court erred in holding that the Board could place the name of the Joint Council on the ballot and, as a result of the election, could certify it as representative of the employees, when none of the employees were members of the Joint Council or had designated it as representative, but it had some indefinite relationship with a local union in which a number of the employees were members.

(5) The Court erred in holding that the Board could determine as appropriate a unit composed of two departments, out of 350 departments in a department store, where the employees possessed some degree of skill, which, however, was not different from the skill required of employees in other departments doing the same kind of work and where rival unions were conducting storewide organizing campaigns and the petitioning union claimed substantial membership throughout the store and had announced that this was the first of a series of petitions and had publicly announced

"Where we will petition next depends upon only one thing. That is, which group is ready next."

V.

SUMMARY OF ARGUMENT.

A.

Paragraph 1 (b) of the Board's order, as modified by the Court and ordered enforced as so modified, is a blanket order restraining the Company generally from violating Section 7 of the National Labor Relations Act. This order is too broad. The decision of the Circuit Court of Appeals, Eighth Circuit, enforcing that portion of the order is in conflict with an applicable decision of this Court and is in conflict with decisions of other Circuit Courts of Appeals on the same question and is erroneous. Nothing in the record in this case justifies such a blanket order.

B.

The filing and announcement of the Company's application for approval by the National War Labor Board of the general salary increase for substantially all the Company's employees was not an unfair labor practice under the law. The decision by the Court below that such conduct by the Company was an unfair labor practice is in conflict with an applicable decision of this Court and is in conflict with the decision of another Court of Appeals on the same question and is erroneous.

C.

The certification of the Joint Council by the Board was invalid because the Board's finding that the Joint Council had substantial membership among the employees involved was not supported by any evidence, and the Board's action in placing the name of the Joint Council on the ballot was a representation to the employees that the Joint Council did have such membership, and the Board's action in

certifying the Joint Council and in ordering the Company to bargain with it was arbitrary, unreasonable and capricious.

D.

The Board's determination in this case of the unit as appropriate for the purposes of collective bargaining was arbitrary, unreasonable and capricious and cast an undue and unreasonable burden upon the Company.

VI.

ARGUMENT.

A.

Paragraph 1 (b) of the Board's Order, as Modified by the Court and Ordered Enforced as so Modified, Is a Blanket Order Restraining the Company Generally From Violating Section 7 of the National Labor Relations Act. This Order Is Too Broad. The Decision of the Circuit Court of Appeals, Eighth Circuit, Enforcing That Portion of the Order Is in Conflict With an Applicable Decision of This Court and Is in Conflict With Decisions of Other Circuit Courts of Appeals on the Same Question and Is Erroneous. Nothing in the Record in This Case Justifies Such a Blanket Order.

Paragraph 1 (b) of the Board's order, as modified by the Court and ordered enforced as so modified, is as follows:

> "(b) In any other manner interfering with, restraining, or coercing its employees **who are referred to in paragraph 1 (a)** in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed

in Section 7 of the National Labor Relations Act." (Emphasis supplied to show the words which were added by the Court to the Order as originally issued by the Board.)

Although the order as so modified by the Court is limited in its application to the employees in the two departments known as busheling rooms, it remains a blanket order to cease and desist from all violations of the Act with relation to those employees. As issued originally by the Board, it was a blanket order against the Company without any limitation. As modified by the Court, it is limited in its application to the employees of two departments, but remains a blanket order restraining all violations of the Act.

There is nothing in the record and nothing in the opinion of the Court below which under the law supports the broad language contained in the order, either as originally issued or as modified by the Court.

In the case of **National Labor Relations Board v. Express Publishing Co.**, 312 U. S. 426, 85 L. Ed. 930, the order sought to be enforced by the Board was for all practical purposes identical with the order in this case. This Court said:

> "It is obvious that the order of the Board, which when judicially confirmed, the courts may be called on to enforce by contempt proceedings, must, like the injunction order of a court, state with reasonable specificity the acts which the respondent is to do or refrain from doing. It would seem equally clear that the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct.
>
> . . . . . .

"We hold only that the National Labor Relations Act does not give the Board an authority, which courts cannot rightly exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found. To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past."

The Board found, and the Court below sustained its finding, that the Company had engaged in an unfair labor practice in refusing to bargain with the Joint Council pending the decision of the Court below. Also the Board found, and the Court below sustained its finding, that the Company had engaged in an unfair labor practice in filing its application with the National War Labor Board for approval of the $2 per week general salary increase to more than 4500 employees in its St. Louis store and stating to the War Labor Board its intention to include the employees in the two departments for whom the Joint Council had been certified as bargaining agent, but that those employees might be excluded if the Joint Council objected to their being included.

If it be assumed that the Company's filing the application for approval of the salary increase was an unfair labor practice, it was no more than an additional refusal to bargain with the Joint Council pending judicial review of the certification. Certainly the acts taken by the Company to obtain approval of the salary increase for more than 4500 employees, only about 30 of whom were claimed to be represented by the Joint Council, would not be an unfair labor practice, except to the extent that it was evidence of the Company's refusal to bargain with the Joint Council whose certification was being contested. No contention was made, and none could be made, that the Com-

pany filed the application with the War Labor Board for the purpose of interfering with the union. The only contention was that the Company did not bargain with the union.

Of the five cases mentioned in the opinion of the Court below (Tr. p. 17) as holding that a voluntary wage increase without collective bargaining may be an unfair labor practice, if the employees are organized, the case of N. L. R. B. v. Christian Board of Publication, 113 Fed. (2d) 678 (C. C. A. 8), held that the wage increase under the circumstances of that case was evidence of the company's domination of an independent union. In the other four cases, Wilson & Co., Inc., v. N. L. R. B., 115 Fed. (2d) 759 (C. C. A. 8); Singer Mfg. Co. v. N. L. R. B., 119 Fed. (2d) 131 (C. C. A. 7); N. L. R. B. v. Barrett Co., 135 Fed. (2d) 959 (C. C. A. 7), and Great Southern Trucking Co. v. N. L. R. B., 127 Fed. (2d) 180 (C. C. A. 5), it was held that the wage increase involved in each case was evidence of the company's refusal to bargain.

Assuming, however, that two distinct unfair labor practices—(1) refusal to bargain and (2) failure to bargain for the storewide salary increase with a union which claimed to represent only 30 to 40 employees in two departments—have been found by the Board and sustained by the Court, there is still no justification for the broad language contained in paragraph 1 (b) of the order.

The record here shows only that the Company exercised the right given by Section 10 of the National Labor Relations Act to have the Court review the decision of the Board. That review could be obtained only by refusing to bargain.

In the case of **American Federation of Labor v. National Labor Relations Board**, 308 U. S. 401, 409, 84 L. Ed. 347, 352, this Court said:

> "Here it is evident that the entire structure of the Act emphasizes, for purposes of review, the distinc-

tion between an 'order' of the Board restraining an unfair labor practice and a certification in representation proceedings. The one authorized by § 10 may be reviewed by the court on petition of the Board for enforcement of the order, or of a person aggrieved, in conformity to the procedure laid down in § 10, which says nothing of certifications. The other, authorized by § 9, is nowhere spoken of as an order, and no procedure is prescribed for its review apart from an order prohibiting an unfair labor practice. The exclusion of representation proceedings from the review secured by the provisions of § 10 (f) is emphasized by the clauses of § 9 (d), which provide for certification by the Board of a record of a representation proceeding only in the case when there is a petition for review of an order of the Board restraining an unfair labor practice. **The statute on its face thus indicates a purpose to limit the review afforded by § 10 to orders of the Board prohibiting unfair labor practices**, a purpose and a construction which its legislative history confirms." (Emphasis supplied.)

Hence, with respect to the refusal to bargain, the Company's unfair labor practice was the only practice which it could follow to obtain a judicial review of the Board's order.

With respect to the other alleged unfair labor practice, the failure of the Company to bargain for a salary increase to all its employees with the Joint Council which had been certified as bargaining agent for approximately 30 people, the record shows that the Company submitted all the facts to the War Labor Board and expressed its willingness to have the 30 employees included or, if the union should object to their inclusion, to have them excluded. Here, also, there was shown no more than the Company's failure to accept the certification by the Board pending a judicial review of that certification under Section 10 of the National Labor Relations Act, for if the Company had recognized the Joint Council and bargained

with it, the propriety of the certification would have been a moot question and there would have been nothing for review by the Court.

Nothing in the Company's conduct would justify an order restraining other violations which bear no resemblance to the Company's refusal to recognize the Joint Council pending a court review of the certification and the Company's effort to obtain War Labor Board approval of a general salary increase for more than 4500 employees, only about 30 of whom were involved in the contested certification, where the Company showed a willingness to have them either included or excluded as the Joint Council might elect. Nothing in the Company's conduct gives evidence of any danger that the Company would commit any unfair labor practices in the future and the Board did not find that it was justified in anticipating any future violation of the Act from the course of the Company's conduct in the past.

It appears plain that the decision of the Court below is in conflict with the decision of this Court in the case of **National Labor Relations Board v. Express Publishing Co.**, supra.

Also, the decision of the Court below enforcing paragraph 1 (b) of the Board's order, as modified by the Court, is in conflict with decisions of other Circuit Courts of Appeals on the same question.

In the case of **National Labor Relations Board v. Mason** (CCA 9), 126 Fed. (2d) 810, the Court sustained the Board's finding that the respondent had engaged in unfair labor practices in discharging eleven employees in violation of Section 8 (3) of the Act, but it ordered the elimination of language similar to that contained in Paragraph 1 (b) of the Order under review here.

In the case of **National Labor Relations Board v. Newark Morning Ledger Company** (CCA 3), 120 Fed. (2d) 262, the Board found, and the Court sustained the finding,

that the respondent discharged the president of the local union because of her activity in behalf of the union. The Board ordered the reinstatement of the employee with back pay and the Board's order also contained language practically identical with the language of paragraph 1 (b) of the Board's order in this case. The Court enforced the portion of the Board's order which required reinstatement and back pay, but it ordered stricken out the blanket portion of the order restraining the respondent from committing any act in violation of the statute, and the Court said:

> "It is, however, now settled that in the absence of any finding that the unfair labor practices actually engaged in by an employer have been so persistent and varied as to justify the apprehension of continued similar and varied efforts in the future to interfere with the employees' right of self-organization and collective bargaining, the entry of a blanket order to cease and desist from all violations of the act is not justified. National Labor Relations Board v. Express Publishing Co., 61 S. Ct. 693."

In the case of **Singer Mfg. Co. v. National Labor Relations Board** (CCA 7), 119 Fed. 2d 131, the Court sustained the Board's finding that the company had refused to bargain with the union and also found that the company had given wage increases to the employees while refusing to bargain with the union. The facts in that case are not similar to the facts involved here, because there the company was not seeking a judicial review of the Board's order but was meeting with the union and not bargaining in good faith, as the Board found. However, the two alleged unfair labor practices of which complaint is made here, refusal to bargain and granting a unilateral wage increase, were present in the Singer Manufacturing Company case and there the Court ordered the elimination from the Board's order of language similar to the language contained in Paragraph 1 (b) of the order under review here. The Court said:

"Petitioner, complaining that that portion of the order which directs petitioner to cease and desist from interfering with, restraining or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act 'in any other manner' is beyond the Board's power, relies upon the language of this court in N. L. R. B. v. Swift & Co., 7 Cir., 108 Fed. (2d) 988, 990, wherein we said that the Board was not warranted in enjoining respondents in that cause from committing any act 'which might constitute a violation of Sec. 7 of the Act.'

"In the interest of certainty administrative orders and judicial judgments should be limited strictly to disposition of only such issues as are actually presented. The language of Mr. Justice Stone, in N. L. R. B. v. Express Publishing Company, 61 S. Ct. 693, 700, 85 L. Ed. . . ., decided March 3, 1941, as follows, is applicable: 'The National Labor Relations Act does not give the Board an authority, which courts cannot rightly exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found. To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past. That justification is lacking here. To require it is no more onerous or embarrassing to the Board than to a court. * * * An appropriate order in the circumstances of the present case would go no further than to restrain respondent from any refusal to bargain and from any other acts in any manner interfering with the Guild's efforts to negotiate.'

"So here the order appropriately should go no further than restrain petitioner from refusing to bargain and from any other acts in any manner interfering with United's efforts to negotiate. The order will be modified as indicated and, as modified, enforced."

To the same effect is a decision of the Circuit Court of Appeals, Seventh Circuit, in the case of **National Labor Relations Board v. Swift & Co.**, 108 Fed. 2d 988.

It seems plain that the decision of the Court below in ordering the enforcement of paragraph 1 (b) of the order is in conflict with an applicable decision of this Court and with the decisions of other Circuit Courts of Appeals, as specifically pointed out above. The action of the Court below in modifying this portion of the Board's order did not correct the error. It limited the application of the erroneous portion of the order to those employees in the two departments known as busheling rooms, but it remains a blanket order restraining the Company from acts which the Company is not claimed to have committed. And there is no basis in the Company's past conduct to suggest that other violations of the Act should be anticipated. It is therefore respectfully submitted that paragraph 1 (b) of the Board's order, as modified by the Court, should be eliminated, or at least modified so that it will be limited to the alleged unfair labor practice found by the Board.

B.

The Filing and Announcement of the Company's Application for Approval by the National War Labor Board of the General Salary Increase for Substantially All the Company's Employees Was Not an Unfair Labor Practice Under the Law. The Decision by the Court Below that Such Conduct by the Company Was an Unfair Labor Practice Is in Conflict With an Applicable Decision of This Court and Is in Conflict With the Decision of Another Court of Appeals on the Same Question and Is Erroneous.

When the Company filed with the National War Labor Board on August 31, 1943, its application for approval of a $2 per week general salary increase for more than 4500

employees in its store and adjacent warehouse and also filed an application for approval of a similar general increase for its employees in its Spring Avenue Warehouse (Bd. Ex. 9, Tr. pp. 2-[187-201]), it was required to choose between including or excluding the 30 to 40 employees in the two departments for which the Board had certified the Joint Council as representative. The Company desired to obtain a court review of that certification and it was given the right to obtain such review by Section 10 of the National Labor Relations Act. In order to preserve that right and not render the question of the propriety of the certification a moot question, the Company could not bargain with the Joint Council for the 30 to 40 employees, but was required by the circumstances either to include them in the application with the 4500 employees of the store or to exclude them. In that situation the Company wrote a letter to the National War Labor Board (Tr. pp. 2-[187-188]) and filed it with the applications, and in the letter the Company advised the War Labor Board of all the circumstances, including the certification and the fact that the Company intended to contest the certification in Court and stated it was the Company's intention to include in the application the employees in the two departments, Nos. 280 and 281, but if the Joint Council objected they could be excluded (Tr. p. 2-[188]). The Company announced to its employees that the applications had been filed, but it made no specific mention of the employees in the busheling rooms.

The Board held that this action of the Company was an unfair labor practice, and the Court below sustained that holding (Tr. p. 16). The Court in its opinion has stated that the Act makes it the duty of the employer to bargain collectively with a certified union and that a voluntary wage increase without collective bargaining when the employees are organized may be found to be an unfair labor practice. As shown above, however, the authorities cited

by the Court hold only that the granting of a wage increase under the circumstances involved in those cases was in one case evidence of a Company-dominated union, and in the other four cases evidence of a refusal to bargain.

In the case of **Medo Photo Supply Corp. v. National Labor Relations Board,** 321 U. S. 678, this Court held that the granting of a voluntary wage increase, without collective bargaining when the employees were organized, was an unfair labor practice only because it was granted, in response to an offer of the employees, to induce them to leave the union. No suggestion of that kind appears in this case.

In the case of **Peter J. Schweitzer, Inc., v. National Labor Relations Board** (App. D. C.), 144 Fed. 2d 520, the majority of the Court said;

> "We cannot agree with the concurring opinion filed here that an increase in wages or an improvement in working conditions made during an election period is an unfair labor practice provided there is no suggestion that these benefits would be withdrawn if a union is organized. Such a principle would mean that it is the duty of an employer to refrain from benefiting his employees in order to make them more inclined to vote for a union."

The Company believes that under the law it was entitled to file its application with the National War Labor Board for approval of the general salary increase for substantially all its employees. The Company was then contesting the claim of the Joint Council to be the exclusive bargaining agent for the 30 to 40 employees of the bushelling rooms, and it recognized that the union might object to either the inclusion or the exclusion of those 30 to 40 employees in the said application. Therefore, the Company advised the National War Labor Board of all the facts and stated its willingness to have these few employees in Departments 280 and 281 either included or

excluded, as the Joint Council should elect. Thus, the Company made it possible for the employees in these two departments to obtain the benefit of the increase, but also made it possible for the Joint Council to exclude those employees from the application if the Joint Council felt that its interests would be best served (as apparently the Board felt they would be) by excluding them.

The decision of the Board and the opinion of the Court below appear to mean that there was nothing the Company might do to avoid engaging in an unfair labor practice except to refrain entirely from filing any application for approval of a salary increase for any or all its employees. We submit that such position is untenable and we do not believe that there is anything in the National Labor Relations Act which justifies the holding that an employer may not file an application with the National War Labor Board for approval of a general salary increase for over 4500 employees merely because a union has been certified as the representative of 30 to 40 employees, and the certification is then being contested in court, as provided by Section 10 of the National Labor Relations Act.

The entire subject of the application for approval by the National War Labor Board of the general salary increase shows absolutely no motive on the part of the Company except a legitimate business purpose, and the exercise by the Company of legal rights in furtherance of that business purpose. There is no evidence and no room for an inference that the Company intended to deprive the union of any credit or otherwise to injure it.

The Court below in its opinion referred to the fact that the union filed its charge with the Board on September 3, 1943, and that on September 11, 1943, the Company's vice president made an announcement to the employees in which he referred to the application then pending before the National War Labor Board, and said:

> "We sincerely hope that nothing will occur which will delay, or obstruct or prevent this approval."

The Court apparently drew an unfavorable inference from the chronology of these events (Tr. p. 16). But the Court overlooked the fact that the Company had no knowledge of the charge filed by the Joint Council at the time the Company's vice president on September 11, 1943, made his statement to the employees. Although the charge was filed with the Board on September 3, 1943 (Tr. p. 1-[29]), as stated in the opinion, the Company was not advised of it until September 23, 1943, when the Board issued its Complaint and Notice of Hearing (Tr. pp. 1-[35-36]).

None of the announcements made by the Company relating to the storewide salary increase contained any reference to the employees in Departments 280 and 281. In the Transcript pp. 2-(181-182) it is shown that the Board's Trial Attorney offered in evidence only those portions of the announcement of September 11 which were quoted in the opinion. The Board's Trial Attorney omitted to read into the record the remainder of that announcement which would have explained the reason for the language used. Then in the Court below for the first time it was inferred that the reference was to the charge filed by the union. The remainder of the announcement, which the Board could have introduced, would have shown to what the quoted language referred, but the Board chose not to offer the entire announcement. In any event, the record in this case shows that notice of the filing of the charge was not given to the Company until September 23, long after the announcement of September 11.

The Joint Council did not represent the 4500 other employees of the Company's store who were entitled to receive this storewide salary increase. There certainly would have been a claim of discrimination if the Company had applied for approval of the increase for all the employees except the employees in Departments 280 and 281. Therefore, the Company placed the entire situation, with all the facts, before the National War Labor Board and

stated its willingness to have the employees of Departments 280 and 281, either included or excluded. Certainly that position should not furnish any basis for a charge of bad faith.

The Board claims that the Company did not act in good faith because it did not bargain with the union for Departments 280 and 281 before filing the application for the storewide salary increase, but Section 10 of the National Labor Relations Act gives to the employer the right to obtain judicial review of the Board's orders. It is said that the certification was valid when issued and although subject to review, it could not be disregarded pending a review. **The difficulty with this position is that the certification cannot be reviewed in any other way than by refusing to comply with it. (American Federation of Labor v. National Labor Relations Board, 308 U. S. 401, 409, 84 L. Ed. 347, 352.)**

It is respectfully submitted that the construction placed by the Court below upon the National Labor Relations Act is contrary to the intent of Congress as shown by that Act and is in conflict with the applicable decision of this Court in the case of **Medo Photo Supply Corp. v. National Labor Relations Board,** 321 U. S. 678, and is in conflict with the decision of the Court of Appeals for the District of Columbia in the case of **Peter J. Schweitzer, Inc., v. National Labor Relations Board,** supra.

C.

The Certification of the Joint Council by the Board Was Invalid Because the Board's Finding That the Joint Council Had Substantial Membership Among the Employees Involved Was Not Supported by Any Evidence, and the Board's Action in Placing the Name of the Joint Council on the Ballot Was a Representation to the Employees That the Joint Council Did Have Such Membership, and the Board's Action in Certifying the Joint Council and in Ordering the Company to Bargain With It Was Arbitrary, Unreasonable and Capricious.

Section 9 (c) of the National Labor Relations Act provides that the Board shall provide for an appropriate hearing whenever a question affecting commerce arises concerning the representation of employees. Pursuant to this section the Board by long-established practice has required a showing, satisfactory to it, that the petitioning union represents a substantial number of the employees in the unit found to be appropriate.

In the Matter of Houston Shipbuilding Corporation, 41 N. L. R. B. 638, l. c. 641;
In the Matter of American Manufacturing Company, 41 N. L. R. B. 995;
In the Matter of Smith & Caffrey Co., 38 N. L. R. B. 90, l. c. 92.

Recognizing that procedure, the petitioning union here, Joint Council, alleged in its petition for certification that substantially more than 51 per cent of the employees in the unit had designated the petitioner as their representative for collective bargaining (Tr. p. 1-[4]). In the Decision and Direction of Election issued by the Board on June 16, 1943, the Board said that the petitioning union, St. Louis Joint Council, United Retail, Wholesale and Department Store Employees of America, CIO, would in said Decision

and Direction of Election be thereafter referred to as the "CIO" (Tr. p. 1-[9]). The Board then found that a statement of its Regional Director, introduced into evidence at the hearing, **"indicates the membership of the CIO"** in the unit thereinafter found appropriate (Tr. p. 1-[11]). The only portion of the record upon which the Board could base its said finding was the statement of the Regional Director which showed no membership in the Joint Council, but rather membership in "The United Department Store Employees Union" (Tr. p. 2-[86]).

Although the witness Verderber testified that he did not know why the petition for certification in this case was filed by the Joint Council, it appears to be fairly obvious that it was done in an effort to avoid the effect of the decision by the Board entered on December 24, 1942, in the case No. R-4580, 46 N. L. R. B. 36, dismissing the petition filed by Department Store Employees Union, Local 372, for certification in a storewide unit of employees at the Company's store, in which petition the petitioning union represented that it had been designated as the representative of more than 51 per cent of all the employees in such storewide unit (Tr. p. 2-[159-167]).

Whether or not that was the reason for the filing of the petition in this case by the Joint Council, the record shows that not one employee of the Company belonged to the Joint Council, and not one employee of the Company had designated the Joint Council as the employees' bargaining agent. The finding by the Board that presumably a substantial number of the employees in the unit found by the Board to be appropriate were members of the Joint Council was not supported by any evidence and was directly contrary to the facts shown by the record. It is true that the Joint Council won the election held by the Board, but it is also true that the name of the Joint Council was the only name on the ballot (Tr. p. 1-[27]) and was placed there by the Board with a completely unwarranted finding

that it had a substantial number of members in the unit. In the matter of **Corn Products Refining Co.**, 58 N. L. R. B., No. 263, the Board said:

> "The literature in question does not purport to be a statement by a Board representative, **and the fact that the name of the Association appeared on the official ballot and the Regional Director's announcements of the election constituted positive proof, brought home to every voter, that this Board does recognize the Association as a legitimate labor organization,** contrary to the CIO's claim." (Emphasis supplied.)

How can the Board justify its certification of the Joint Council as the representative of all the employees in the unit based upon the result of an election which the Board held under an order which incorrectly represented to the voting employees that a substantial number of those employees were members of the Joint Council, which was the only name placed on the ballot by the Board? This was not mere inadvertence on the part of the Board. The Company called to the Board's attention the error which it had made. The Respondent's Motion for Reconsideration of the Decision and Direction of Election (Tr. p. 1-[17-20]) was filed and was considered by the Board and ruled upon before the election was held (Tr. p. 1-[25-26, 28]).

In view of the claim of special knowledge and understanding of representation cases claimed by the Board and recognized by the courts; in view of the Board's obligation to be impartial; in view of the non-reviewability of the Board's findings of facts and even its inferences therefrom (if supported by "substantial" evidence); in view of the recent decision of the Circuit Court of Appeals, Fourth Circuit, in the case of Madden v. Brotherhood and Union of Transit Employees, 15 L. R. R. 806, holding that there can be no court review of the Board's finding of company domination, if the finding is made in a repre-

sentation case; and in view of the finality of the decision of the Board as to appropriateness of any unit unless it is arbitrary and capricious, it would at least seem to be required of the Board that it refrain from holding out to the employees that a substantial number of their fellow employees were members of the Joint Council, when, in fact, as the Board well knew, not one of the employees was a member of the Joint Council. It is no answer to say that the Joint Council won the election by a very high percentage. The question is whether it can safely be said that this arbitrary and wholly unwarranted action by the Board did not influence the result of the election. Is it too much to ask that the Board refrain from consciously influencing the result of an election? Is it necessary further for the Company to show the number of votes so influenced?

If the Board had held that it was justified in placing the name of the Joint Council on the ballot because of the record showing that a number of employees in the unit had signed cards authorizing the United Department Store Employees' Union to represent them and the testimony of the organizer Boggs that the Joint Council is an organization composed of all the local unions and plants organized by the United Retail, Wholesale and Department Store Employees Union in the St. Louis Area, then we might challenge the correctness of the Board's opinion, but at least the employees would have had the benefit of a full disclosure of the facts by the Board. The Board chose, however, to hold the election on its order which contained the incorrect finding that the Joint Council had membership, and presumably substantial membership, among the employees. We submit that this action of the Board, taken consciously by the Board, destroys any presumption of validity which might otherwise attach to the Board's certification issued pursuant to Section 9 of the National Labor Relations Act, and was arbitrary, unreasonable and capricious, and that the Company was not

obligated to accept the said certification issued by the Board with such disregard for the true facts shown by the record.

D.

The Board's Determination in This Case of the Unit as Appropriate for the Purposes of Collective Bargaining Was Arbitrary, Unreasonable and Capricious and Cast an Undue and Unreasonable Burden Upon the Company.

Section 9 (b) of the National Labor Relations Act, 29 U. S. C. A., Sec. 159, authorizes the Board to decide in each case whether the unit shall be the employer unit, craft unit, plant unit or subdivision thereof. This authority of the Board, however, is subject to the limitation that such designation of the unit by the Board shall not be arbitrary, unreasonable or capricious.

Pittsburgh Plate Glass Co. v. National Labor Relations Board (CCA 8), 113 Fed. 2d 698, aff'd 313 U. S. 146, 85 L. Ed. 1251;
National Labor Relations Board v. Delaware-New Jersey F. Co. (CCA 3), 128 Fed. 2d 130, 137;
National Labor Relations Board v. Clarksburg Pub. Co. (CCA 4), 120 Fed. 2d 976, 980;
Bussmann Mfg. Co. v. National Labor Relations Board (CCA 8), 111 Fed. 2d 783, 785;
National Labor Relations Board v. Lund (CCA 8), 103 Fed. 2d 815, 819.

The record here shows that it was not the purpose of the Joint Council to represent the tailors as a separate unit for the benefit of the tailors. The petition filed with the Board for the bushelmen's unit was merely a part of one of the two rival storewide campaigns. It sought to have an election in a storewide unit in the fall of 1942, and its petition, filed on November 6, 1942, included the bushel-

men in the storewide unit (Tr. pp. 2-[159-161]). After that petition was denied the C. I. O. said, with reference to the petition in this case:

> "This is the first of a series of election petitions for various groups of employees. Others will follow shortly. * * * Our plan is to organize these groups as nearly 100% as possible just as we did the tailors. Then we will petition the Board for elections as rapidly as they are ready. * * * Remember. This new plan in no way conflicts with our final goal of a 100% Union store. We believe this new approach may do the job faster. * * * Your department alone may compose a bargaining unit. * * * By this new plan of action we are not dividing the employees into different local unions. Local 372 will remain the one Union in the store" (Int. Ex. 11, Tr. p. 2-[133]).

A few days later it said:

> "We will also discuss filing more election petitions. Perhaps your department will be included in this discussion. * * * We want to proceed at Famous-Barr unit by unit, until the time comes when we can petition for the entire store. Where we will petition next depends upon only one thing. That is which group is ready next" (Int. Ex. 12, Tr. pp. 2-[137-139]).

The witness Verderber, who is a member of the Master Committee of Local 372 (Tr. p. 2-[11]), testified, and the union claimed, that it has substantial membership throughout the store (Tr. p. 2-[11]). Verderber testified that the efforts to organize the store as a whole were continuing (Tr. p. 2-[30]). He testified that he considered a storewide unit the most desirable unit for the employees of the Company (Tr. p. 2-[30]).

The rights of the employees to organize and to bargain collectively are guaranteed by the National Labor Relations Act, but there is no law which requires an employer

to submit to a continuous series of campaigns, elections and bargaining conferences, because one of two competing unions believes it will thereby gain an advantage in reaching the ultimate goal of both unions to organize all the employees in one storewide unit. The intention of the CIO to carry on its campaign unit by unit is evident from its published statements quoted above. And the Board, by departing from its established policy and finding appropriate the unit claimed in this case, has indicated that the Company may not look to it for protection of the Company's right to operate its store without the long series of interruptions planned and announced by the CIO.

In its Decision and Direction of Election the Board made the following finding:

> "The Company contends further that the unit now sought is inappropriate in that it fails to include employees in the women's alteration department whose skills are similar to the skills of the employees in the unit sought by the CIO. While we agree that the record indicates a high degree of similarity in the work done in the alteration of women's clothing and in the work done in the busheling rooms, the departments are in different sections of the store; there is historically a sharp demarcation between the trades involved; and it does not appear that there is a substantial interchange of personnel between the women's and men's departments. Traditionally, such workers have been represented by separate craft unions" (Tr. p. 1-[13]).

In the first sentence of this finding the Board incorrectly stated the Company's position, which was that the fur alteration department, as well as the women's alteration department, employed skills comparable to those in the men's busheling rooms (Tr. pp. 2-[76, 78]).

In the remainder of the above quotation from the Decision and Direction of Election, the Board set forth rea-

sons for placing two groups of tailors employed by the Company in a unit separate from the other tailors employed by the Company. The first of these reasons was that the departments are in different sections of the store. This is specious, because each of the two busheling rooms is also in a different section of the store. Department 280 is on the second floor balcony of the store (Tr. p. 2-[3]) and Department 281 is in the basement (Tr. p. 2-[5]); the women's alteration department is on the eleventh floor (Tr. p. 2-[3]). The next reason given for distinguishing the women's alteration employees from the employees of the busheling rooms is: "There is historically a sharp demarcation between the trades involved." There was no evidence to support this statement of the Board. The union's witness Verderber, an employee in one of the busheling rooms, had worked on women's coats without difficulty (Tr. p. 2-[30]). The union's witness Scherer, business agent of the Amalgamated Clothing Workers, testified that in the only store under contract with his union, which handles both men's and women's clothing, the same employees alter both men's and women's clothing (Tr. p. 2-[36]). The witness Weber, manager of the basement busheling room, Department 281, had previously conducted his own tailoring business and made and altered both men's and women's clothing (Tr. p. 2-[40]). And the witness Swartz, who is superintendent of work rooms at Scruggs-Vandervoort-Barney, another department store in St. Louis, Missouri, has charge of all work rooms in that store and constantly transfers employees back and forth; he testified:

> "Q. In your opinion, would a qualified tailor be able to do the work in a busheling room or in the women's alteration department just as well? A. I use them for both.
>
> Q. Is that the setup at Scruggs? A. Yes, sir.

Q. You switch them back and forth as needed? A. Yes, sir.

* * * * * * *

Q. Does that also apply to the fur alteration room? A. Yes. I transfer people from that alteration room to the fur work room.

Q. And from the fur work room to the men's or women's alteration rooms? A. That is right.

* * * * * * *

Q. Is the act of skill required to do one of these classes of work in one of the work rooms mentioned as great as it is in one of the other work rooms? A. You mean one kind of skill?

Q. Yes, for the operator to go into one of the other rooms? A. I would say that is identical" (Tr. pp. 2-[61-63]).

There was no evidence to the contrary and no evidence to support the Board's conclusion that historically there is a demarcation between the trades.

The next reason given for making a distinction between the two groups of tailors in the busheling rooms and the other tailors is: "And it does not appear that there is a substantial interchange of personnel between the women's and men's departments." Verderber testified concerning transfers out of Department 280 to other parts of the store, including the fur work room (Tr. pp. 2-[6-10]). And the witness McCarthy testified that there were cases of interchange of employees between the men's busheling room and the women's alteration department, and vice versa (Tr. pp. 2-[76, 80-81]).

The last reason given for making a distinction between the employees of the two busheling rooms and the employees of the women's alteration department is: "Traditionally such workers have been represented by separate craft unions." The witness Scherer, business agent for the Amalgamated Clothing Workers, testified:

"Well, so far as the International Ladies' Garment Workers Union, it is an organization that caters more to the ladies' industry, such as dresses, underwear and so on. Our organization is more or less the men's clothing" (Tr. p. 2-[34]).

Doubtless that is true in the manufacturing industries, but the evidence in this case showed that in alteration departments it is not so. The Amalgamated Clothing Workers represents tailors working on both men's and women's clothing in the only store it has under contract which sells both (Tr. p. 2-[36]), and Local 372, United Retail, Wholesale and Department Store Employees, CIO, solicited not only the employees in the busheling rooms involved in this case, but also the employees in the women's alteration department (Int. Ex. 15, Tr. p. 2-[153]; Int. Ex. 12, Tr. p. 2-[139]), and it included all such employees in its petition for a storewide unit filed November 6, 1942 (Int. Ex. 17, Tr. pp. 2-[159-161]). In the case of **J. L. Brandeis & Son and Local No. 285 of the Amalgamated Clothing Workers of America, CIO, 47 N. L. R. B. 614**, the Amalgamated Clothing Workers petitioned for, and the Board ordered, an election in a unit composed of the employees engaged in the alteration of men's, women's and boys' clothing. In the case of **The May Department Stores Co., d/b/a The May Company, and Retail Clerks' International Protective Association and Retail Textile Clerks, A. F. of L., 39 N. L. R. B. 471, 1. c. 478**, which involved the Denver store of the Company, the Board said:

"The Textile Clerks request that seamstresses and furriers be included in its unit, but that tailors be excluded. The Company would include all three classifications of employees. Seamstresses perform alterations on ladies' clothing and millinery. Furriers alter and repair furs and are in charge of fur storage. Tailors are engaged in performing alterations on men's clothing. It is thus apparent that the duties of these

employees are similar. The Textile Clerks would exclude the tailors for the reason that they are under the jurisdiction of another organization affiliated with the American Federation of Labor and that several, in fact, are members of that organization. However, the seamstresses and furriers are also eligible to membership in other labor organizations connected with the American Federation of Labor. We shall exclude the seamstresses, furriers and tailors from the Textile Clerks' unit."

Thus we see that the stated reasons of the Board for holding that two groups of tailors out of several groups in the store constitute an appropriate unit are not supported by the evidence, but are, in fact, contrary to the evidence shown by the record, and are evidence of capriciousness, particularly since entirely opposite results were reached in the other cases cited.

The union in this case has no history of bargaining for tailors as a separate unit. At the trial of the representation case it was so stipulated (Tr. p. 2-[70-71]).

This is not a case where the Board's decision is based upon its interpretation of facts in evidence, but is a case where there is no evidence to sustain any of the reasons given by the Board for establishing the claimed unit. The Board's action is contrary to its expressed standards for determining an appropriate unit, is contrary to its practice in similar department store cases and is contrary to its "extent of organization theory," and consequently its action can only be considered as unreasonable and arbitrary.

It appears from the record that the unit composed of the employees in Departments 280 and 281 was not claimed by the union for the purpose of insuring to those employees their right to collective bargaining, but rather to assist the union in its campaign to organize the entire store, unit by unit, and to file a series of election petitions. In

view of the fact that the record shows the Company has over 350 departments in the store and there are two competing labor organizations undertaking to organize the employes of the store, the Company submits that the Board's action was unreasonable, arbitrary and capricious. The disturbances to the store's operations and the ill feeling engendered by the campaigns in a long series of elections, each for the employees of one or two departments, would cause an undue and unreasonable burden upon the Company. We submit that the Board's action in establishing this unit and directing an election therein and in ordering the Company to bargain with the union as a result of that election was unlawful and void, and we submit that said order should not be enforced.

CONCLUSION.

It is respectfully submitted that this case should be reviewed by this Court. The decision of the Court below is in conflict with applicable decisions of this Court and is in conflict with decisions of other Circuit Courts of Appeals, and the Court below has decided important questions of federal law which have not been, but should be, settled by this Court.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

MAY DEPARTMENT STORES COMPANY,
Doing Business as FAMOUS-BARR
COMPANY,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD.

No. 971. 39

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Eighth Circuit.

REPLY BRIEF.

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REPLY BRIEF.

ERRONEOUS STATEMENTS IN BRIEF FOR THE BOARD.

There are many erroneous statements contained in the brief for the National Labor Relations Board, in opposition to the Petition for Writ of Certiorari in this case, such as the following:

On page 7 of the brief for the Board it is said a number of employees had signed cards which ran to a local and that the Board found that the Joint Council represents its local affiliates in collective bargaining, and there is a reference

to the Decision and Direction of Election issued by the Board (R. 1, 11). On the contrary, the Board found that the Joint Council had membership, and presumably substantial membership, among the employees in the unit. This finding was directly contrary to the evidence (Tr. 1 [11]).

On pages 9 and 10 of the brief for the Board it is said that the Petitioner advised the National War Labor Board with respect to the employees in the unit "in the event that the Union should object to the inclusion of the bushelling employees, the application should be considered amended so as to include them." The letter which was in evidence (Tr. 2 [187-188]) shows the Petitioner stated clearly to the National War Labor Board that in the event the Union should object to the inclusion of the employees of Departments 280 and 281, then they should be **excluded.**

On page 10 of the brief for the Board reference is made to the filing of the Union's Charge on September 3, 1943, and again they neglect to say that Petitioner had no knowledge of such Charge until the Complaint was issued on September 23, 1943 (Tr. 1 [35]).

On page 11 and also on page 15 of the brief for the Board references are made to paragraph 1 (b) of the Board's order, and it is said that the Petitioner was ordered to cease and desist from "in any manner interfering with, restraining or coercing its employees," etc. The order of the Board (Tr. 1 [53]) actually ordered the petitioner to cease and desist from "in any **other** manner interfering with, restraining or coercing its employees." This is significant because the order contains no prohibition of, or reference to, any specific act of interference, restraint or coercion.

On page 14 of the brief for the Board there is a quotation of a definition of the term "duly recognized collective bargaining agent" from the present Regulations of the National War Labor Board. This is in connection with

an argument relating to Petitioner's application for approval of the $2 per week storewide salary increase filed August 31, 1943, but they neglect to say that the quoted definition did not appear in the Regulations of the War Labor Board until October, 1943. At the time Petitioner's application was filed it was required only to notify the Board of the existence of "a duly recognized collective bargaining agent." It was not until October, 1943, that the War Labor Board required also notice of a union which had been certified by the National Labor Relations Board, whether or not it had been recognized. Nevertheless, Petitioner did advise the National War Labor Board of all the facts relating to the certification of the Joint Council in this case and stated its willingness to include or exclude the employees in departments 280 and 281 at the option of the Joint Council.

ERRONEOUS LEGAL CONCLUSIONS IN BRIEF FOR THE BOARD.

(1) The argument numbered 1 in the brief for the Board is based upon a completely erroneous conception of the question involved. Regarding the case of **Medo Photo Supply Corp. v. National Labor Relations Board**, 321 U. S. 678, it is said on page 12 of the brief for the Board: "The Court explicitly held that 'negotiations by (the employer) for wage increases with any one other than the Union, the designated representative of the employees, was an unfair labor practice.'" But that is irrelevant here. In this case there were no negotiations by the Petitioner with any one. The Petitioner merely sought approval of the War Labor Board to grant a voluntary $2 per week salary increase to substantially all its employees.

In the Medo Photo Supply Corp. case there were direct negotiations between the employer and the employees, and the Court held that (1) the direct negotiations with the

employees when they were represented by the union was an unfair labor practice, and (2) "it was likewise an unfair labor practice for petitioner, in response to the offer of its employees, to induce them by the grant of wage increases, to leave the union." The Court considered the petitioner's contention that the wage increase was not conditioned upon the employees' leaving the Union, and presumably would have considered that a complete defense but held that there was substantial evidence to support the Board's finding that the wage increase was conditioned upon the employees' leaving the union.

In the brief for the Board here reliance is placed upon the holding in the Medo Photo Supply Corp. case with respect to direct negotiations, but that has nothing to do with this case, because there were no such negotiations. The decision of the Court below in this case is in conflict with the decision of this Court in the Medo Photo Supply Corp. case with respect to the holding that the granting of a wage increase was an unfair labor practice only because it was conditioned upon the employees' leaving the Union. In the brief for the Board no attempt is made to discuss that conflict.

On page 14 of the brief for the Board it is said that the Union might risk losing its members if it failed to object to the wage increase which the Petitioner proposed to grant. It is absurd to say that a union representing 30 people would gain or lose any credit by reason of the Petitioner's granting a voluntary storewide increase to its more than 4,500 employees.

(2) On page 15 of the brief for the Board reference is made to the asserted conflict of the decision of the Court below with the decision of this Court in **National Labor Relations Board v. Express Publishing Co.**, 312 U. S. 426, and it is said that the Petitioner's argument "is apparently based upon the erroneous assumption that the Board

could not properly find that the Petitioner's unilateral action with respect to the wage increase was a direct violation of Section 8 (1) of the Act." This is not a correct statement of Petitioner's position. In the Petitioner's brief on page 20 we said clearly that, assuming for the sake of argument that two distinct unfair labor practices, (1) refusal to bargain and (2) the granting of the storewide salary increase, had been correctly found by the Board and sustained by the Court, there is still no justification for the the broad language contained in paragraph 1 (b) of the order. And the conflict with the decision of this Court in the Express Publishing Company case is not affected by the question of whether or not the granting of the salary increase was an unfair labor practice. In the Express Publishing Company case this Court said:

> "It would seem equally clear that the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct."

In this case, even assuming that the granting of the salary increase was an unfair labor practice, the employer's conduct amounts to no more than availing itself of the statutory right to judicial review of the Board's decision relating to a unit of 30 employees and, pending such review, filing an application with the War Labor Board for approval of a storewide $2 per week salary increase for more than 4,500 employees in which it was willing either to include or exclude the 30 employees as the Union might elect. Certainly that conduct would not persuasively be related to "in any other manner interfering with, restraining, or coering its employees in the exercise of their right to self-organization."

The conflict of the decision below with the decision of this Court in the Express Publishing Company case is apparent whether or not the granting of the salary increase should be held to be an unfair labor practice.

In the brief for the Board it is said that this Court and several Circuit Courts of Appeals, including the Third, Seventh and Ninth Circuits, have enforced provisions identical with paragraph 1 (b) of the order involved here. In none of the three cited cases decided by this Court, N. L. R. B. v. Automotive Maintenance Machinery Co., 315 U. S. 282; N. L. R. B. v. Electric Vacuum Cleaner Co., 315 U. S. 685, and N. L. R. B. v. Nevada Consolidated Copper Corp., 316 U. S. 105, is there any mention of a provision similar to paragraph 1 (b) of the order involved here. In several of the cited cases decided by other Circuit Courts of Appeals there is no mention of any such provision and not one of the cases is in point. The decision in the Express Publishing Company case recognized that under certain circumstances a broad order could be issued where the past conduct of the employer showed a threat of continued and varied violations. Such circumstances were present in some of the cases cited in the brief for the Board, but those cases are not in conflict with the decision of this Court in the Express Publishing Company case. In that case this Court said:

> "To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed, or that danger of their commission in the future is to be anticipated from the course of his conduct in the past."

In this case there is no claim, and there could be no claim, that interference, restraint and coercion of its employees by Petitioner "is to be anticipated from the course of his conduct in the past."

(3) The argument on pages 19 and 20 of the brief for the Board, with relation to the unit, ignores completely the fact shown by the record that the Union's petition for this unit was not filed for the benefit of the employees in the unit, but only as a part of the store-wide campaign, in which the Union said:

> "This is the first of a series of election petitions for various groups of employees. Others will follow shortly. * * * Remember. This new plan in no way conflicts with our final goal of a 100% Union store.[0] We believe this new approach may do the job faster. * * * By this new plan of action we are not dividing the employees into different local unions. Local 372 will remain the one union in the store" (Int. Ex. 11, Tr. p. 2 [133]). "Where we will petition next depends upon only one thing. That is which group is ready next" (Int. Ex. 12, Tr. p. 2 [139]).

That is not the "extent of organization" principle recognized by this Court in the case of National Labor Relations Board v. Hearst Publications, 322 U. S. 111, in which this Court said:

> "No plausible reason is suggested for withholding the benefits of the Act from those here seeking it until a group of geographically separated employees becomes interested in collective bargaining."

This is a case where one of two unions competing in store-wide organization campaigns and having substantial membership throughout the store (Tr. pp. 1 [7, 8], 2 [11]) is seeking to gain an advantage in reaching the ultimate goal of both unions to organize all the employees in one store-wide unit by a series of election petitions in units determined on a basis of expediency.

Perhaps we should call attention also to the fact that these 30 employees are not "bushelmen" in the technical

sense, but are alteration employees in a retail store and include fitters, markers, tailors, tailoresses, finishers, pressers, machine operators, examiners and rippers. And employees doing the same work are engaged in altering women's clothing (Tr. p. 2 [54]).

(4) It is indeed surprising that it should be said on page 23 of the brief for the Board that the arbitrary and wholly unwarranted action of the Board in making and publishing a finding contrary to the facts shown by the record, and which it should be presumed influenced the result of the election, is not a matter of general importance in the administration of the Act.

CONCLUSION.

It is respectfully submitted that the decision of the Court below is in conflict with applicable decisions of this Court and is in conflict with decisions of other Circuit Courts of Appeals and that the Court below has decided important questions of federal law which have not been, but should be, settled by this Court and that this case should be reviewed by this Court.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

MAY DEPARTMENT STORES COMPANY, Doing Business as FAMOUS-BARR COMPANY,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD.
No. 39.

BRIEF FOR THE PETITIONER.

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IN THE

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OCTOBER TERM, 1945.

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Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD.
No. 39.

BRIEF FOR THE PETITIONER.

I.

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals, Eighth Circuit, is reported at 146 Fed. (2d) 66. It appears at page 264 of the Transcript of the Record, and the order of said Court modifying the order of the National Labor Relations Board appears at page 283.

II.

JURISDICTION.

The Court's jurisdiction is invoked pursuant to the provisions of the Judicial Code, Sec 240, as amended, 28 USCA, Sec. 347, and of the National Labor Relations Act, Sec. 10 (e), 29 USCA, Sec. 160 (e). The date of the decree entered by the Court below is January 11, 1945 (R. 284). Petition for Certiorari was filed in this Court on February 21, 1945 (R. 288), and the Order of this Court allowing certiorari was filed April 9, 1945 (R. 287).

III.

STATEMENT OF THE CASE.

This case was commenced by the National Labor Relations Board (hereinafter called the "Board"), which filed in the United States Circuit Court of Appeals, Eighth Circuit, pursuant to Section 10 (e) of the National Labor Relations Act (hereinafter called the "Act," the relevant provisions of which are set out in the appendix), its petition for enforcement of an order entered by the Board on December 17, 1943 (R. 45). The said order directed Petitioner to cease and desist from refusing to bargain collectively with St. Louis Joint Council, United Retail and Department Store Employees of America, affiliated with the Congress of Industrial Organizations (hereinafter called the "Joint Council"), as exclusive representative of the Petitioner's employees at its St. Louis store in two departments, Nos. 280 and 281, engaged in altering men's clothing sold at retail by the Petitioner, and affirmatively ordered the Petitioner to bargain collectively with the Joint Council as representative of said employees (R. 46). Said order in Par. 1 (b) thereof also directed the Petitioner to cease and desist from:

"(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of

the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act"; (R. 46).

The said order also provided for the posting of notices and that the Petitioner should report compliance to the Board.

The Petitioner operates a large department store which includes the main store, three warehouses and a customers' garage. The functions of the Petitioner are divided into more than 350 departments. There is only one pay roll for all the employees and there is no distinction between clerical and non-clerical, selling and non-selling employees. All employment and personnel policies are handled and directed by a central office. Generally the working conditions of all the employees are the same (Intervener's Exhibit 18, R. 174-5; admitted R. 92).

The petitioner has approximately 5,000 employees in St. Louis (R. 3). There are 30 to 40 employees in the two departments, 280 and 281 (R. 3, 24). The employees in these departments, which are sometimes called busheling rooms, make the alterations on men's and boys' clothing sold in the Men's and Boys' Clothing Departments of the store (R. 69). One of the departments, No. 280, is on the second floor balcony (R. 69) and is under the supervision of the manager of the Men's Clothing Department (R. 80). The other department, No. 281, is in the basement (R. 72) and is under the supervision of the manager of the basement Men's Clothing Department (R. 110). The relationship of the operations in these two departments to the operations of the store as a whole is shown by the detailed description of a sale of a suit of clothes, Company's Exhibit 2 (R. 178-183), which was introduced in evidence by consent of the parties (R. 144). This description shows the abso-

lute dependence of the operations of these two, as well as those of the other departments, upon the store operations as a whole. There are identical regulations for the entire store with reference to employment, transfer, promotion, salary increases, layoffs, discharges, discipline, leaves of absence, vacations, admissions to the building, pay roll computations, sick leave pay, advances on salaries, discounts, year-end bonuses, rules for the guidance of employees, group life insurance, group hosiptal insurance, Welfare Association membership, charge accounts, rest rooms, locker rooms, lunch rooms, hospital and library (R. 147).

No charge is made for the alterations in the two busheling room departments, but the services are furnished as a part of the sale of the merchandise. There are very infrequent exceptions in special sales of men's clothing in the basement when a charge is made for an alteration. **These departments are maintained for the purpose of fitting clothing sold in the Men's and Boys' Clothing Departments, and that is their sole function** (R. 147). Although the evidence showed that some degree of skill is required for the work in the busheling departments, this same skill is required for work in the other alteration rooms where women's clothing is altered and where fur garments are altered (R. 98, 104, 109, 110, 124, 132, 133, 138, 146, 148), and the Board so found with respect to the alteration of men's clothing and women's clothing (R. 11).

The Congress of Industrial Organizations* and the American Federation of Labor have been carrying on rival organizing campaigns among Petitioner's employees **in a store-wide unit.** These rival campaigns began long before, and have continued after, the filing of the petition for representation in this case (R. 5, 21, Int. Ex. 5, 9, 11, 12 and 15, R. 159-168, admitted R. 88).

*Although the Joint Council is the petitioning union in this case, the campaign has been carried on by Local 372, United Department Store Employees Union, CIO.

On November 6, 1942, Department Store Employees Union, **Local 372**, Affiliated with United Retail, Wholesale and Department Store Employees of America, CIO, filed with the Board a petition for investigation and certification of representatives pursuant to Sec. 9 (c) of the Act **in a store-wide unit** (Int. Ex. 17, R. 169, admitted R. 92). The American Federation of Labor intervened and, after a hearing, the said petition for representation was dismissed by the Board on December 24, 1942 (Int. Ex. 18; R. 172, admitted R. 92). In the decision the Board said:

> "The parties agreed on a company-wide unit, including the employees of the main store and the St. Charles Street warehouse, but excluding, in general terms, supervisory, managerial, executive, confidential, and temporary employees; employees who are covered by existing contracts; and the Spring Avenue warehouse employees."

The employees in departments 280 and 281 were included in the unit proposed by the union in that case as shown by the petition (R. 169), and as shown by the Union's Brief (Co. Ex. 1, R. 177-8, admitted R. 143), in which other departments were sought to be excluded because of special skills, but 280 and 281 were not. And it was stipulated in this case that in the prior case the union had filed an Exhibit 11 listing specifically the numbers of the departments it wished to include in the unit and that departments 280 and 281 were among them (R. 93, 94, 213).

The petition for investigation and certification, which proposed a unit of only two departments, in the case now before the Court was filed on March 13, 1943 (R. 3), soon after the dismissal of the petition filed by local 372 for a store-wide unit and without any abatement of the store-wide organizing campaign (R. 89, 97, 98). Local 372 claimed substantial membership throughout the store (R. 78) and its membership in departments 280 and 281 had

been continuous since September, 1942 (R. 96), when its Master Committee considered filing a petition for a separate unit composed of those departments but decided to continue organizing on a store-wide basis, which it still considers most desirable for the employees (R. 96-98). The petition in this case was not filed by **Local 372** but was filed by the **Joint Council** (R. 3), although this fact was not disclosed to the employees, but, on the contrary, the Union represented to the employees that the petition had been filed by Local 372 (Int. Exs. 9 and 11, R. 161-164, admitted R. 88).

The Board in its Decision and Direction of Election found the **Joint Council** had membership in the unit which was held to be appropriate (R. 9). This finding as to membership was based solely upon the certificate of the Board's Regional Director that said employees were members of the United Department Store Employees Union (R. 154-156) **but did not show that any employee was a member of the Joint Council.** The testimony of the witness Verderber, an employee in one of the busheling rooms and a member of the Master Committee of the union (R. 78), was that he did not know why the petition was filed by the St. Louis Joint Council (R. 94, 95) and he did not know that Local 372 was a member of the Joint Council until about a month before the hearing (R. 101) and that neither he nor, so far as he knew, any other employee had ever designated the Joint Council as their representative (R. 89, 90). The witness Boggs testified that he was a representative of the Joint Council and he described the council as follows:

> "The St. Louis Joint Council is an organization composed of all of the Local Unions and plants organized by the United Retail, Wholesale and Department Store Employees Union in the St. Louis area" (R. 106).

The authorization cards signed by the employees who were members of the Union did not refer to the Joint Council, but contained the following language:

> "I, the undersigned, hereby request and accept membership in the United Department Store Employees Union and do hereby appoint and authorize the officers thereof, to represent and negotiate for me in all matters pertaining to wages, hours, and other conditions of employment" (R. 155-6).

The Board, after finding that the Joint Council had membership, and presumably substantial membership, in the unit, directed the holding of an election, at which the only name on the ballot was that of the Joint Council (R. 24). Based on the result of that election, the Board on July 12, 1943, issued its certification that the Joint Council is the exclusive representative of all the employees in the unit pursuant to Sec. 9 (a) of the Act (R. 25). The Petitioner on July 19, 1943, notified the Joint Council that it would contest the said certification (Bd. Ex. 8, R. 194, admitted R. 185).

On Sept. 23, 1943, the Board issued its complaint (R. 28-31) and alleged that on and after July 8, 1943, the Petitioner had failed and refused to recognize the Joint Council as exclusive bargaining representative of the employees in the said departments 280 and 281 and had failed and refused to negotiate with the Joint Council as to wages, hours and other conditions of employment, and had thereby engaged in unfair labor practices within the meaning of Section 8 (5) of the Act (R. 30). The Board alleged, also, that on or about August 31, 1943, the Petitioner had taken steps unilaterally to secure the necessary approval by the National War Labor Board of an increase in the salaries of the employees in the said unit and had sought to undermine the Joint Council's majority representation in said unit by informing all employees in the

Petitioner's store that the Petitioner had taken such steps to secure approval of such salary increase and thereby, and by the refusal to bargain, Petitioner had engaged in unfair labor practices within the meaning of Sec. 8 (1) of the Act (R. 30, 31).

The evidence showed that on August 31, 1943, the Petitioner filed with the Wage and Hour & Public Contracts Division of the United States Department of Labor, as agent for the National War Labor Board, under the **Stabilization Act of 1942, 56 Stat. 765,** and **Executive Order 9250,** two applications for approval of a voluntary salary increase in the sum of $2.00 per week, for **all** its employees in St. Louis whose salaries were subject to the jurisdiction of the National War Labor Board, except those employees covered by closed shop contracts with certain unions (Bd. Ex. 9, R. 194-204, admitted R. 187). One of the said applications covered the employees of the Petitioner's Spring Avenue Warehouse and the other application covered the employees in the Petitioner's store and St. Charles Street Warehouse and its Patrons Garage (R. 195). The latter application sought approval of the salary increase for more than **4500 employees** (R. 196A). No specific mention was made in the application of the employees in departments 280 or 281, and none was required under the regulations of the War Labor Board **then in effect** which provided only that the application should state "whether or not there is a duly recognized collective bargaining agent (for any or all of the affected employees) which has not joined with the employer in the application." **Subsequently** this regulation was amended to include a certified bargaining agent as well as a duly recognized agent. [N. W. L. B. Reg., Sec. 802.54 (b), (3)]. However, the Petitioner, desiring to make a full disclosure of the facts, in the letter of transmittal stated:

> "The application which covers the employees at the store shows that we have Union contracts and

working agreements which cover certain craftsmen, including electricians, painters, carpenters and plasterers. These employees, being covered by collective bargaining agreements, are excluded from this application.

"The St. Louis Joint Council, United Retail, Wholesale and Department Store Employees of America, C. I. O., claims to represent the employees in the busheling rooms of the Store, Departments 280 and 281, amounting to approximately 40 employees out of the total of 4,530 employees of the store, and has been certified by the National Labor Relations Board, but we do not regard this as an appropriate unit and have consistently taken that position and have so notified all parties concerned. It is our intention to submit that question to the Courts, if and when the occasion arises. We have not recognized this Union and have not bargained with it for the employees in Departments 280 or 281 and no negotiations with that Union are pending. It is intended, however, that the employees in Departments 280 and 281 shall be included in this application.

"We do not believe that any of the organizations named in the application, nor the organization named above, have any interest whatever in the enclosed application. However, if the organization named above should object to the inclusion of the employees of Departments 280 and 281 in the application, you are advised that said application may be considered as having been amended so as to exclude those employees from the application" (R. 195).

An announcement of the filing of the application was made by the Petitioner on September 1, 1943, over the public address system of the store (Bd. Ex. 10; R. 204-206, admitted 189). It made no specific mention of the employees in departments 280 and 281 but it stated:

"Famous-Barr Company has filed with the proper Government Bureaus voluntary applications to grant a two-dollar weekly salary increase to all full-time

regular and extra employes, selling and non-selling, including salespeople on straight commission, and proportionate increases to all short-hour regular and extra employes in the store and warehouses, with the exception of executives receiving over twenty-six hundred dollars per year, and a comparatively few employes whose salaries have been fixed by closed shop agreements" (R. 205).

A similar announcement appeared in Petitioner's store publication, known as "Store Chat," on September 3, 1943 (Bd. Ex. 11, R. 206A, admitted R. 192). In a later public address system announcement made September 11, 1943, only part of which was read into the record by the Board's Trial Attorney, the applications were mentioned and it was stated that they were pending but no reference was made to any particular employees who were covered by the applications (R. 189, 190).

At the time of the hearing before the Board on October 14, 1943 (R. 183), no action had been taken on the applications by the National War Labor Board and the record in this case does not show whether the Joint Council did or did not file with the War Labor Board objections to the inclusion of the employees of departments 280 and 281 in the application.

IV.

SPECIFICATION OF ERRORS.

(1) The Court erred in holding that the Board could place the name of the Joint Council on the ballot and, as a result of the election, could certify it as representative of the employees in two departments of Petitioner's store, when none of said employees were members of the Joint Council or had designated it as representative, but it had only some indefinite relationship with a local union in which a number of the employees were members and which had been designated as bargaining representative by such employees.

(2) The Court erred in holding that the Board could determine as appropriate a unit composed of two departments, out of 350 departments in Petitioner's department store, where the employees possessed some degree of skill, which, however, was not different from the skill required of employees of other departments doing the same kind of work, and where rival unions were conducting store-wide organizing campaigns and the petitioning union claimed substantial membership throughout the store and had announced that this was the first of a series of petitions and had publicly stated, "Where we will petition next depends upon only one thing. That is, which group is ready next."

(3) The Court erred in holding that the action of the Petitioner in filing and announcing its voluntary application to the National War Labor Board for approval of a $2.00 per week general salary increase affecting the salaries of more than 4500 employees in its St. Louis store and warehouses was an unfair labor practice, in violation of Section 8 (1) of the Act, where the union did not claim to be the representative of the employees except the 30 to 40 employees in two departments, and that claim was based upon a certification then being contested.

(4) The Court erred in holding that the action of the Petitioner in filing and announcing its voluntary application to the National War Labor Board for approval of a general salary increase to substantially all its employees sustained the inference and conclusion of the Board that such action undermined the Joint Council among the 30 to 40 employees for whom it had been certified as bargaining representative, and discouraged employees generally in their union affiliation, where there was no suggestion that any employees should withdraw from the union in order to obtain the benefits of the salary increase.

(5) The Court erred in ordering the enforcement of paragraph 1 (b) of the Board's order, as modified by the Court, and in failing to eliminate said paragraph 1 (b) of the Board's order or, at least, to modify it so that it would be limited to the alleged unfair labor practice found by the Board.

V.

SUMMARY OF ARGUMENT

(A) The Certification of the Joint Council by the Board was invalid because the Board's finding that the Joint Council had substantial membership among the employees involved was not supported by any evidence, and the Board's action in placing the name of the Joint Council as the only name on the ballot was a representation to the employees that the Joint Council did have such membership, and the Board's action in certifying the Joint Council and in ordering the Petitioner to bargain with it was arbitrary, unreasonable and capricious.

(B) The Board's determination in this case of the unit as appropriate for the purposes of collective bargaining was arbitrary, unreasonable and capricious, and casts an undue and unreasonable burden upon the Petitioner.

(C) The filing and the announcement of the Petitioner's application for approval by the National War Labor Board of the general salary increase for substantially all the Petitioner's employees was not an unfair labor practice under Section 8 (1) of the Act.

(D) Paragraph 1 (b) of the Board's Order, as modified by the Court and ordered enforced as so modified, is a blanket order restraining the Petitioner generally from violating Section 7 of the Act. This order is too broad.

VI.

ARGUMENT.

A.

The Certification of the Joint Council by the Board was invalid because the Board's finding that the Joint Council had substantial membership among the employees involved was not supported by any evidence, and the Board's action in placing the name of the Joint Council as the only name on the ballot was a representation to the employees that the Joint Council did have such membership, and the Board's action in certifying the Joint Council and in ordering the Petitioner to bargain with it was arbitrary, unreasonable and capricious.

Section 9 (c) of the Act states that the Board shall provide for an appropriate hearing whenever a question affecting commerce arises concerning the representation of employees. Pursuant to this section the Board by long-established practice has required a showing, satisfactory to it, that the petitioning union represents a substantial number of the employees in the unit found to be appropriate.

In the Matter of Houston Shipbuilding Corporation, 41 N. L. R. B. 638, l. c. 641;
In the Matter of American Manufacturing Company, 41 N. L. R. B. 995;
In the Matter of Smith & Caffrey Co., 38 N. L. R. B. 90, l. c. 92.

Recognizing that procedure, the petitioning union here, **Joint Council**, alleged in its petition for certification that substantially more than 51 per cent of the employees in the unit had designated it as their representative for collective bargaining (R. 4). In the Decision and Direction of Election issued by the Board on June 16, 1943, the Board said that the petitioning union, **Joint Council**, would

in said Decision and Direction of Election be thereafter referred to as the "CIO" (R. 7). The Board then found that a statment of its Regional Director, introduced into evidence at the hearing, **"indicates the membership of the CIO"** in the unit thereinafter found appropriate (R. 9). The only portion of the record upon which the Board could base its said finding was the statement of the Regional Director which showed **no** membership in the **Joint Council**, but rather membership in **"United Department Store Employees Union"** (R. 154, 155).

The filing of the petition by the **Joint Council** was concealed from the employees and the union misrepresented the fact to the employees (even to the extent of incorrectly reproducing the official Board Notice of Hearing so that it showed Local 372, instead of the Joint Council, as the petitioning union) and repeatedly stated that the petition had been filed by Local 372, United Department Store Employees Union, which did have membership in the claimed unit (Int. Exs. 9 and 11, R. 161-164, admitted R. 88). The witness Verderber, a member of the Master Committee of Local 372, testified that he did not know why the petition for certification in this case was filed by the Joint Council (R. 94, 95) and that he had not, and so far as he knew no other employee had, designated the Joint Council as his representative (R. 89, 90). In the Opinion of the Court below it was said that Verderber "testified that at the time he signed the card he knew that Local 372 was a part of the Joint Council" (R. 267). The Court was in error. The witness testified that he signed the card designating Local 372 as his representative in September, 1942 (R. 77, 89), but he did not learn of its relationship to the Joint Council until about a month before the hearing on May 7, 1943 (R. 67, 101).

Possibly the petition filed in this case on March 13, 1943, was filed by the **Joint Council** in an effort to avoid the effect of the decision by the Board entered on De-

cember 24, 1942, in Case No. R-4580, 46 N. L. R. B. 36 (R. 172), dismissing the petition filed by **Local 372** for certification in a store-wide unit of employees at the Petitioner's store, and of the petition in that case in which Local 372 represented that it had been designated as the representative of more than 51 per cent of all the employees in such store-wide unit (Int. Ex. 17, R. 169, admitted R. 92). Whether or not that was the reason for filing the petition in this case by the **Joint Council**, the record shows that not one employee in the claimed unit was a member of the **Joint Council**, and not one employee had designated the **Joint Council** as bargaining agent. The finding by the Board that presumably a substantial number of the employees in the unit found by the Board to be appropriate were **members of the Joint Council** was not supported by any evidence and was directly contrary to the facts shown by the record. It is true that the Joint Council won the election held by the Board, but it is also true that **the name of the Joint Council was the only name on the ballot** (R. 24, 25) and was placed there by the Board with a completely unwarranted finding that it had a substantial number of members in the unit.

In the matter of **Corn Products Refining Co.**, 58 N. L. R. B. No. 263, the Board said:

> "The literature in question does not purport to be a statement by a Board representative, **and the fact that the name of the Association appeared on the official ballot and the Regional Director's announcements of the election constituted positive proof, brought home to every voter that this Board does recognize the Association as a legitimate labor organization**, contrary to the CIO's claim." (Emphasis supplied.)

How can the Board justify its certification of the Joint Council as the representative of all the employees in the

unit, based upon the result of an election held by the Board under an order which arbitrarily and contrary to all the evidence represented to the voting employees that a substantial number of the employees in the unit were members of the Joint Council, whose name was the only name placed on the ballot by the Board? This was not mere inadvertence on the part of the Board. The Petitioner specifically called the Board's attention to the error it had made by a Motion for Reconsideration (R. 14, 16), which was considered by the Board and overruled before the election (R. 22, 25).

In view of the claim of special knowledge and understanding of representation cases claimed by the Board and recognized by the courts; in view of the Board's obligation to be impartial; in view of the non-reviewability of the Board's finding of facts and even its inferences therefrom (if supported by "substantial" evidence); in view of the recent decision of the Circuit Court of Appeals, Fourth Circuit, in the case of **Madden v. Brotherhood and Union of Transit Employees**, 147 F. 2d 439, holding that there can be no court review of the Board's finding of company domination, if the finding is made in a representation case; and in view of the finality of the decision of the Board as to appropriateness of any unit unless it is arbitrary and capricious, it would at least seem to be required of the Board that it refrain from holding out to the employees that a substantial number of their fellow employees were members of the Joint Council, when, in fact, as the Board well knew, not one of the employees was a member of the Joint Council. It is no answer to say, as the Court below said, that the Joint Council won the election by a very high percentage. The question is whether it can safely be said that this arbitrary and wholly unwarranted action by the Board did not influence the result of the election. Is it too much to ask that the Board refrain from consciously in-

fluencing the result of an election? Is it necessary further for the Petitioner to show the number of votes so influenced?

If the Board had held that it was justified in placing the name of the Joint Council on the ballot because of the record showing that a number of employees in the unit had signed cards authorizing the United Department Store Employees' Union to represent them, and the testimony of the organizer Boggs that the Joint Council is an organization composed of all the local unions and plants organized by the United Retail, Wholesale and Department Store Employees Union, CIO, in the St. Louis area, then we might challenge the correctness of the Board's opinion, but at least the employees would have had the benefit of a disclosure of the true facts by the Board. The Board chose, however, to hold the election on its order which contained the incorrect finding that the Joint Council had membership, and presumably substantial membership, among the employees. We submit that this action of the Board, taken consciously by the Board, destroys any presumption of validity which might otherwise attach to the Board's certification issued pursuant to Section 9 of the Act, and was arbitrary, unreasonable and capricious, and that the Petitioner was not obligated to accept the said certification issued by the Board with such disregard for the true facts shown by the record.

B.

The Board's Determination in This Case of the Unit as Appropriate for the Purposes of Collective Bargaining Was Arbitrary, Unreasonable and Capricious and Casts an Undue and Unreasonable Burden Upon the Petitioner.

Section 9 (b) of the Act authorizes the Board to decide in each case whether the unit shall be the employer unit, craft unit, plant unit or subdivision thereof. This authority

of the Board, however, is subject to the limitation that such designation of the unit by the Board shall not be arbitrary, unreasonable or capricious.

Pittsburgh Plate Glass Co. v. National Labor Relations Board (CCA 8), 113 F. 2d 698, aff'd 313 U. S. 146, 85 L. Ed. 1251;
National Labor Relations Board v. Delaware-New Jersey F. Co. (CCA 3), 128 F. 2d 130, 137;
National Labor Relations Board v. Clarksburg Pub. Co. (CCA 4), 120 F. 2d 976, 980;
Bussmann Mfg. Co. v. National Labor Relations Board (CCA 8), 111 F. 2d 783, 785;
National Labor Relations Board v. Lund (CCA 8), 103 F. 2d 815, 819.

The record here shows that it was not the purpose of the Joint Council to represent the employees in departments 280 and 281 as a separate unit for the benefit of those employees. The petition filed with the Board for the bushelmen's unit was merely a part of one of the two rival store-wide organizing campaigns. The CIO sought to have an election in a store-wide unit on its petition filed Nov. 6, 1942. It included departments 280 and 281 in the store-wide unit, although it carefully listed and excluded certain other departments. (R. 93, 94). Among the excluded departments were those which the CIO deemed to be crafts, but it did not so designate departments 280 and 281 (Co. Ex. 1, R. 177, 178, admitted R. 143). After that petition was denied the CIO said, with reference to the petition in this case:

> "This is the first of a series of election petitions for various groups of employees. Others will follow shortly. * * * Our plan is to organize these groups as nearly 100% as possible just as we did the tailors. Then we will petition the Board for elections as rapidly as they are ready. * * * Remember. This new plan in no way conflicts with our final goal of a

> 100% Union store. We believe this new approach may do the job faster. * * * Your department alone may compose a bargaining unit. * * * By this new plan of action we are not dividing the employees into different local unions. Local 372 will remain the one Union in the store" (Int. Ex. 11, R. 163, 164, admitted R. 88).

A few days later it said:

> "We will also discuss filing more election petitions. Perhaps your department will be included in this discussion. * * * We want to proceed at Famous-Barr unit by unit, until the time comes when we can petition for the entire store. Where we will petition next depends upon only one thing. That is which group is ready next" (Int. Ex. 12, R. 165, 166, admitted R. 88).

Substantial membership throughout the store is claimed by both the CIO (R. 78) and the A. F. of L. (R. 5, 6), and both are seeking to organize on a store-wide basis (R. 18-21, 89, 97, 98). A store-wide unit is considered to be the most desirable unit by the A. F. of L. (R. 5, 6), by the CIO (R. 98, 100), by the Petitioner (R. 9) and by the Board (R. 11). The Board, however, decided, and the Court below sustained it, that the small unit of two departments proposed in this case should be established on what the Board has developed as its "extent of organization" theory (R. 11, 268). The Board claims support for this theory in **National Labor Relations Board v. Hearst Publications**, 322 U. S. 111, and in **National Labor Relations Board v. Botany Worsted Mills**, 133 F. 2d 876 (CCA 3), certiorari denied 319 U. S. 751, and in **National Labor Relations Board v. Lettie Lee, Inc.**, 140 F. 2d 243 (CCA 9). None of those cases, however, supports the Board's decision in this case which approved the unit, not for the sake of the employees in the unit, but to aid one of two competing labor organizations conducting rival

campaigns in a larger unit. In the **Hearst Publications** case, this Court, referring to the "extent of organization" theory, said (p. 135):

> "This is done on the express theory that it is desirable in the determination of an appropriate unit to render collective bargaining of the company's employees an immediate possibility. No plausible reason is suggested for withholding the benefits of the Act from those here seeking it until a group of geographically separated employees becomes interested in collective bargaining."

In this case there is no geographical separation, and a plausible reason for awaiting organization on the basis of the admittedly more appropriate store-wide unit appears in the undisputed evidence that the attempt to set up the two departments as a separate unit was only a calculated step to gain an advantage in the organization of the whole store and was not motivated by a desire to give a present benefit to the employees of the two departments.

In the **Botany Worsted Mills** case a small unit was approved because there was not a substantial number of the remaining employees who belonged to any union; but in this case both the CIO and the A. F. of L. claim a substantial number of employees in a store-wide unit.

In the **Lettie Lee** case a small unit was approved because the other employees were not eligible to membership in the petitioning union, but in this case both the rival unions have solicited and admitted to membership employees throughout the store.

It was stipulated at the hearing that the United Retail, Wholesale and Department Store Employees of America, CIO, has contracts with a number of department stores throughout the United States, that in said contracts the busheling department employees are either included in the industrial unit with other selling and non-selling employees

or were excluded because they had been previously organized by another union, **but that said United Retail, Wholesale and Department Store Employees of America, CIO, has no contract for any busheling department as a separate unit in any department store in the United States** (R. 140-142).

The right of the employees to organize and to bargain collectively is guaranteed by the Act, but certainly nothing in the Act requires an employer to be subjected to a continuous series of campaigns and elections and bargaining conferences where, as in this case, the employer's business functions are divided into 350 departments, but all are merely component parts of one operation. The complete dependence of departments 280 and 281 on the operations of the remainder of the store is described fully in Company's Exhibit 2 (R. 178-183, admitted 144). This evidence showed that the two departments involved in this case could function only as a part of the store. They could not even build up a stockpile of work. They merely alter the clothing as it is sold in the selling departments in the regular course of business.

There was no reason for establishing any unit smaller than the store-wide unit, which all the parties and the Board agree is the appropriate unit, except as a matter of expediency on the part of one of the competing unions which believes that it will thereby gain advantage in reaching the ultimate goal of both unions to organize all the employees in a store-wide unit. The intention of the CIO to carry on its campaign unit by unit is evident from its published statements quoted above. And the Board by departing from its established policy has indicated that the Petitioner may not look to it for protection of the Petitioner's right to operate its department store without the long series of campaigns, elections and bargaining conferences planned and announced by the CIO.

In its Decision and Direction of Election the Board made the following finding:

> "The Company contends further that the unit now sought is inappropriate in that it fails to include employees in the women's alteration department whose skills are similar to the skills of the employees in the unit sought by the CIO. While we agree that the record indicates a high degree of similarity in the work done in the alteration of women's clothing and in the work done in the busheling rooms, the departments are in different sections of the store; there is historically a sharp demarcation between the trades involved; and it does not appear that there is a substantial interchange of personnel between the women's and men's departments. Traditionally, such workers have been represented by separate craft unions" (R. 11).

In the first sentence of this finding the Board incorrectly stated the Petitioner's position, which was that the fur alteration department, as well as the women's alteration department, employed the same skills as those in the men's busheling departments (R. 146). In the remainder of the above quotation from the Decision and Direction of Election, the Board set forth reasons for placing employees in two alteration departments in a unit separate from the employees in other alteration departments. The first of these reasons, that the departments are in different sections of the store, is specious, because **each of the two busheling departments is also in a different section of the store.** Department 280 is on the second floor balcony of the store (R. 69) and Department 281 is in the basement (R. 72); the women's alteration department is on the eleventh floor (R. 69). The next reason, "There is historically a sharp demarcation between the trades involved," is not supported by any evidence. The union's witness Verderber, an employee in department 280, had

worked on women's coats without difficulty (R. 98). The union's witness Scherer, business agent of the Amalgamated Clothing Workers, testified that in the only store in St. Louis under contract with his union which handles both men's and women's clothing, the same employees alter both men's and women's clothing (R. 104). The witness Weber, manager of the basement department 281, had previously conducted his own tailoring business and made and altered both men's and women's clothing (R. 109). And the witness Swartz, who is superintendent of work rooms at Scruggs-Vandervoort-Barney, another department store in St. Louis, Missouri, has charge of all work rooms in that store and constantly transfers employees back and forth. He testified:

> "Q. In your opinion, would a qualified tailor be able to do the work in a busheling room or in the women's alteration department just as well? A. I use them for both.
>
> Q. Is that the setup at Scruggs? A. Yes, sir.
>
> Q. You switch them back and forth as needed? A. Yes, sir.
>
> * * * * * * *
>
> Q. Does that also apply to the fur alteration room? A. Yes. I transfer people from that alteration room to the fur work room.
>
> Q. And from the fur work room to the men's or women's alteration rooms? A. That is right.
>
> * * * * * * *
>
> Q. Is the act of skill required to do one of these classes of work in one of the work rooms mentioned as great as it is in one of the other work rooms? A. You mean one kind of skill?
>
> Q. Yes, for the operator to go into one of the other rooms? A. I would say that is identical" (R. 132, 133).

The next reason given for making a distinction between the employees in the two alteration departments, 280 and

281, and the employees in other alteration departments is, "And it does not appear that there is a substantial interchange of personnel between the women's and men's departments." Verderber testified concerning transfers out of Department 280 to other parts of the store, including the fur work room (R. 74-77). And the witness McCarthy testified that there were cases of interchange of employees between the men's busheling room and the women's alteration department (R. 146, 150).

The last reason given for making a distinction between the employees of departments 280 and 281 and the employees of the women's alteration department is: "Traditionally such workers have been represented by separate craft unions." The witness Scherer, business agent for the Amalgamated Clothing Workers, testified:

> "Well, so far as the International Ladies' Garment Workers Union, it is an organization that caters more to the ladies' industry, such as dresses, underwear and so on. Our organization is more or less the men's clothing" (R. 103).

However, the testimony of this witness, as well as the constitution of the International Ladies Garment Workers Union, made it clear that the jurisdictional separation applies in the **manufacturing industries** (R. 225, 226, 231). The evidence in this case showed no such separate representation in **alteration departments of retail stores.** The Amalgamated Clothing Workers represents employees in the alteration department working on both men's and women's clothing in the only store in St. Louis it has under contract which sells both (R. 104), and Local 372, United Department Store Employees, CIO, has solicited not only the employees in the busheling rooms involved in this case, but also the employees in the women's alteration department (Int. Exs. 5 and 15, R. 160, 168, admitted

R. 88), and it included all such employees in its petition for a store-wide unit filed Nov. 6, 1942 (Int. Ex. 17, R. 169, admitted R. 92). In the case of **J. L. Brandeis & Son and Local No. 285 of the Amalgamated Clothing Workers of America, CIO**, 47 N. L. R. B. 614, the Amalgamated Clothing Workers petitioned for, and the Board ordered, an election in a unit composed of the employees engaged **in the alteration of men's, women's and boys' clothing.**

In the case of **The May Department Stores Co., d/b/a The May Company, and Retail Clerks' International Protective Association and Retail Textile Clerks, A. F. of L.**, 39 N. L. R. B. 471, l. c. 478, which involved the Denver store of the Petitioner, the Board said:

> "The Textile Clerks request that the seamstresses and furriers be included in its unit, but that tailors be excluded. The Company would include all three classifications of employees. Seamstresses perform alterations on ladies' clothing and millinery. Furriers alter and repair furs and are in charge of fur storage. Tailors are engaged in performing alterations on men's clothing. It is thus apparent that the duties of these employees are similar. The Textile Clerks would exclude the tailors for the reason that they are under the jurisdiction of another organization affiliated with the American Federation of Labor and that several, in fact, are members of that organization. However, the seamstresses and furriers are also eligible to membership in other labor organizations connected with the American Federation of Labor. We shall exclude the seamstresses, furriers and tailors from the Textile Clerks' unit."

Thus we see that the stated reasons of the Board for holding that employees in two alteration departments out of several such departments in the store constitute an appropriate unit are not supported by the evidence, but are, in fact, contrary to the evidence shown by the record,

and are proof of capriciousness, particularly since entirely opposite results were reached in the other cases cited.

This is not a case where the Board's decision is based upon its interpretation of facts in evidence, but is a case where there is no evidence to sustain any of the reasons given by the Board for establishing the claimed unit. The Board's action is contrary to its expressed standards for determining an appropriate unit, is contrary to its practice in similar department store cases and is contrary to its "extent of organization" theory, and consequently its action can only be considered as unreasonable and arbitrary.

It is evident from the record that the unit composed of the employees in departments 280 and 281 was not claimed by the union for the purpose of insuring to those employees their right to collective bargaining, but rather to gain an advantage in its campaign to organize the entire store, unit by unit, and to file a series of election petitions. In view of the fact that the record shows the Petitioner has over 350 departments in the store and there are two competing labor organizations undertaking to organize the employees of the store, the Petitioner submits that the Board's action was unreasonable, arbitrary and capricious. The disturbances to the store's operations and the ill feeling engendered among many groups of employees by rival campaigns in a long series of elections, each for the employees of one or two departments, would cause an undue and unreasonable burden upon the Petitioner. We submit that the Board's action in establishing this unit and directing an election therein and in ordering the Petitioner to bargain with the Joint Council as a result of that election was unlawful and void, and we submit that said order should not be enforced.

C.

The filing and the announcement of the Petitioner's application for approval by the National War Labor Board of the general salary increase for substantially all the Petitioner's employees was not an unfair labor practice under Section 8 (1) of the Act.

When the Petitioner filed with the National War Labor Board on August 31, 1943, its application for approval of a $2 per week general salary increase for more than 4500 employees in its store and adjacent warehouse and also filed an application for approval of a similar general increase for its employees in its Spring Avenue Warehouse (Bd. Ex. 9, R. 194-204, admitted R. 187), it was required either to include or exclude the 30 to 40 employees in the two departments 280 and 281 for which the Board had certified the Joint Council as representative. The Petitioner desired to obtain a court review of that certification and it was given the right to obtain such review by Section 10 of the Act. In order to preserve that right and not to render the propriety of the certification a moot question, the Petitioner could not bargain with the Joint Council for the 30 to 40 employees, but was required by the circumstances either to include them in the application with the 4500 other employees of the store or to exclude them. In that situation the Petitioner wrote a letter to the National War Labor Board (R. 194, 195) and filed it with the applications, and in the letter the Petitioner advised the War Labor Board of all the circumstances, including the certification and the fact that the Petitioner intended to contest the certification in Court and stated it was the Petitioner's intention to include in the application the employees of the two departments, 280 and 281, but if the Joint Council objected they could be excluded (R. 195). The Petitioner announced to its em-

ployees that the applications had been filed, but it made no specific mention of the employees in the busheling rooms.

The Board held that this conduct of the Petitioner was an unfair labor practice in violation of Section 8 (1) of the Act (R. 53). Its reasoning is shown by the Intermediate Report of the Board's Trial Examiner, which was adopted by the Board (R. 45), and which contained the following language:

> "The Board and the courts have uniformly held that unilateral action by an employer in the granting of a wage increase, where there is a duly constituted and existing bargaining representative of the employees affected, is in derogation of the union's right to recognition and representation in such matters. It logically follows that the respondent's action in ignoring the Union while attempting to win approval of its proposal for wage increases, and in publishing the facts of its unilateral action to its employees, including employees represented by the Union, had the effect of depriving the Union of credit which normally would accrue to it, and of nullifying its efficacy as a bargaining agent. The said action may, therefore, reasonably be said to have undermined the Union among employees for whom it had been certified as bargaining representative, and to have discouraged employees generally in their union affiliation" (R. 52).

No cases were cited by the Board in support of its conclusion.

The Court below sustained the said holding of the Board, and it said:

> A voluntary wage increase without collective bargaining when the employees are organized and have selected a bargaining agent may be found to be an unfair labor practice. **N. L. R. B. v. Christian Board of Publication**, 8 Cir., 113 F. 2d 678, 681, 683; **Wilson**

& Co., Inc., v. N. L. R. B., 8 Cir., 115 F. 2d 759, 763; **Singer Mfg. Co. v. N. L. R. B.**, 7 Cir., 119 F. 2d 131, 136, cert. den. 313 U. S. 595; **N. L. R. B. v. Barrett Co.**, 7 Cir., 135 F. 2d 959, 961; **Great Southern Trucking Co. v. N. L. R. B.**, 4 Cir., 127 F. 2d 180, 186, cert. den. 317 U. S. 652. Such unilateral action on the part of an employer is evidence of an intentional disregard of the National Labor Relations Act, and, in this case, it sustains the inference and conclusion of the Board that such action undermined the union among the employees for whom it had been certified as bargaining representative and discouraged employees generally in their union affiliation" (R. 272-273).

Now, the Board and the Court below found only that the Petitioner refused to bargain with the Joint Council pending judicial review of the certification, and that is all that could be found under the facts of this case. There was no evidence, and not even a suggestion, that the Petitioner filed the application for approval of a store-wide salary increase for **4500 employees** for the purpose of undermining the Joint Council among the **30 to 40 employees** in the two busheling departments. Such a suggestion would be absurd and no such claim has been made in this case. The only claim is that the Petitioner should have bargained with the Joint Council as the representative of the 30 to 40 employees in the busheling departments before stating its willingness to include those employees in the application along with the 4500 other employees. In other words, the claim is that the Petitioner refused to bargain with the Joint Council. If the Petitioner is correct in its position, heretofore stated, that the certification was invalid, then it was under no duty to bargain with the Joint Council and it has not engaged in any unfair labor practice. Assuming, however, for the sake of argument, that the Petitioner's position with respect to the certification is incorrect and that it was under a duty to bargain with the Joint Council,

then it has engaged in an unfair labor practice within the meaning of Section 8 (5) of the Act, but the filing and announcement of the application to the National War Labor Board add nothing to the Petitioner's express refusal to bargain shown by its letter to the Joint Council dated July 19, 1943 (Bd. Ex. 8, R. 194, admitted R. 185), in which the Petitioner said:

> "In reply to your letter of July 8th, requesting that we bargain with you for the Bushelmen, you are advised that we decline to do so for the reason that we do not agree that your organization represents a majority of the employees within an appropriate unit, and we wish to preserve our full rights to question the recent decision of the National Labor Relations Board on that subject as we may see fit.
>
> "We also reserve the right to question the jurisdiction of the N. L. R. B. in the matter" * (R. 194).

That letter was sent immediately after the certification for the purpose of notifying the Joint Council that the Petitioner would contest the certification in the only way it could do so, which was by refusing to bargain. Under the Act a certification standing alone is not subject to review by the Courts, but judicial review of a certification can be obtained only by the respondent's refusal to bargain and the issuance by the Board of a cease and desist order. **American Federation of Labor v. N. L. R. B.**, 308 U. S. 401, 409. Therefore, on August 31, 1943, when the Petitioner filed with the National War Labor Board its application for approval of a storewide $2.00 per week salary increase for 4500 employees, its willingness to include in the application the 30 to 40 employees of the busheling departments added nothing to the fact that the

* At that time the jurisdiction of the National Labor Relations Board over a retail store had not yet been decided by this Court in the cases of: **National Labor Relations Board v. J. L. Hudson Co.** (CCA 6), 135 F. 2d 380, cert. denied Oct. 11, 1943, 320 U. S. 740; **J. L. Brandeis & Son v. N. L. R. B.** (CCA 8), 142 F. 2d 977, cert. denied Oct. 16, 1944, 89 Law. Ed. 56.

Petitioner had expressly refused to bargain pending a judicial determination of the validity of the certification. This is shown clearly by the cases cited in the opinion of the Court below.

In the case of **National Labor Relations Board v. Christian Board of Publication** (CCA 8), 113 F. 2d 678, the Court held merely that the granting of a wage increase was evidence of domination of an independent union. The Court said:

> "The wage increase, therefore, was certainly a relevant circumstance for the Board to consider in determining the question of respondent's domination and support of the Employees Committee."

In the case of **Wilson & Co., Inc., v. N. L. R. B.** (CCA 8), 115 F. 2d 759, the wage increase was mentioned only as evidence which with other evidence tended to sustain the finding that the company had refused to bargain with the union in good faith. The only finding was that the company had violated Section 8 (5) of the Act and the only order required the company to bargain collectively with the union.

In the case of **Singer Mfg. Co. v. N. L. R. B.** (CCA 7), 119 F. 2d 131, the wage increase was considered only as evidence which with other evidence tended to show a refusal to bargain in good faith and the Court refused to enforce any portion of the Board's order except the order under Section 8 (5) of the Act restraining the company from refusing to bargain and from any other conduct in any manner interfering with the union's efforts to negotiate.

In the case of **National Labor Relations Board v. Barrett Co.** (CCA 7), 135 F. 2d 959, the Court said:

"Announcing an increase in wages while negotiations are in progress, without prior agreement thereon by the union, is a violation of Section 8 (5) of the Act."

In the case of **Great Southern Trucking Co. v. National Labor Relations Board** (CCA 4), 127 F. 2d 180, the Court said:

"Similarly, Southern's action regarding wages and paid vacation concessions, two of the most important elements of the employer-employee relationship, without prior agreement thereon by the union and while negotiations were still in progress, constituted an obvious attempt to settle unilaterally matters with respect to which Southern was under a statutory duty to deal with the union. Such conduct itself constitutes a violation of Section 8 (5) of the Act."

Certainly under other circumstances the granting of a wage increase might constitute interference, restraint or coercion of the employees in the exercise of the rights guaranteed to them in Section 7 of the Act, but no such circumstances are present in this case. The Petitioner's willingness to include the employees of the busheling departments in the application for the storewide increase was not in any way conditioned upon the employees leaving the union and could not in any way interfere with their rights under Section 7 of the Act. In the announcements which followed the filing of the application for approval of the wage increase, no mention was made of these employees in the busheling departments and certainly no effort was made by the Petitioner to interfere with their relations to the Union.

In the case of **Medo Supply Corp. v. National Labor Relations Board**, 321 U. S. 678, this Court held that the granting of a voluntary wage increase without collective bar-

gaining when the employees were organized was an independent unfair labor practice under Section 8 (1)* as well as a violation of Section 8 (5) of the Act only because the increase was granted, in response to an offer of the employees, to induce them to leave the union. This Court said, p. 685:

> "Quite apart from the Board's finding of an unfair labor practice in petitioner's direct negotiations with its employees when they had not revoked their designation of the union, there can be no question but that it was likewise an unfair labor practice for petitioner, in response to the offer of its employees, to induce them by the grant of wage increases, to leave the union, National Labor Relations Bd. v. Falk Corp., 308 U. S. 453, 460, 461, 84 L. ed. 396, 399, 400, 60 S. Ct. 307. This violation of § 8 (1) was in itself sufficient to support the Board's order to cease and desist. The words and purpose of §§ 7 and 8 (1) of the Act enjoin an employer from interfering with, or coercing, its employees in their rights to self-organization, to form, join, or assist labor organizations, and to bargain collectively through representatives of their own choosing. There could be no more obvious way of interfering with these rights of employees than by grants of wage increases upon the understanding that they would leave the union in return."

That case is distinguished from the case at bar in that there were in that case direct negotiations between the employer and the employees as a result of which the employer granted a wage increase and the employees left the union. There were no such negotiations, nor any negotiations whatever, in the case at bar, and the salary increase was not conditioned in any way. Moreover, in that case the union represented all the employees, while here the Joint

* It is not important in this case that violations of Section 8 (5) of the Act have been held to be also technical violations of Section 8 (1), and in this brief we have not considered such technical violation of Section 8 (1), but only independent violations of Section 8 (1).

Council had been certified as the representative of only 30 to 40 out of more than 4500 employees for whom the salary increase application was filed. The language quoted above from the majority opinion has a reference to a footnote in which it is stated specifically that there was evidence to support the Board's finding that the purpose and the effect of the wage increase was to induce the employees to leave the union. The dissenting opinion is based upon a contrary interpretation of the facts. In that opinion it is said, page 700:

> "Consequently answer (3), which Medo gave, was the only one it could give consistently with the view that the employer should hold out no inducement to the employees to abandon the union. In effect it said simply: 'We are perfectly willing you should have the increase. But whether you have it through the union or without it is entirely your own business and we will not have anything to do with this.' Any other reply would have been a counter-proposal offering inducement to abandon or a rejection of all bargaining. The answer Medo gave was neither. It was merely accession to the employees' wishes, not 'inducement' or offer held out; and it was coupled with the clear indication, under the circumstances, that what the employees might do about the union was wholly their own affair and none of Medo's.
>
> "Accordingly, I think Medo gave the only possible answer consistent with the statute's requirements and purposes and the only one which afforded no substantial basis for finding either that it was refusing to bargain collectively or that it was interfering with the employees' rights of organization by offering inducement to get rid of the union."

In spite of the difference of opinion as to the facts in the Medo case, both the majority and the dissenting opinions hold as to the law that the granting of the wage increase was not in and of itself a violation of Section 8 (1) of the

Act, but the majority opinion held it was such a violation because it was conditioned upon the employees leaving the union; whereas, the dissenting opinion was that in the absence of such a condition there was no violation of the Act.

In the case of **Peter J. Schweitzer, Inc., v. National Labor Relations Board** (App. D. C.), 144 Fed. 2d 520, the majority of the Court said, p. 524:

> "We cannot agree with the concurring opinion filed here that an increase in wages or an improvement in working conditions made during an election period is an unfair labor practice provided there is no suggestion that these benefits would be withdrawn if a union is organized. Such a principle would mean that it is the duty of an employer to refrain from benefiting his employees in order to make them more inclined to vote for a union."

In the case at bar the Petitioner's willingness to include the 30 to 40 employees of the busheling departments in the salary increase for more than 4500 other employees was neither the subject of any negotiation between the Petitioner and the busheling department employees, nor was it offered with any condition or intimation that said employees should leave the union. It is certainly true that the Petitioner did not negotiate with the Joint Council about this increase, but neither did it negotiate with the employees directly. It filed its application with the National War Labor Board and it notified the National War Labor Board that it was willing to include the busheling department employees unless the Joint Council objected, in which event the Petitioner was willing that those employees should be excluded. The increase was not a subject of bargaining with anyone. It was a voluntary store-wide increase to eliminate substandards of living and was not offered in lieu of bargaining for the busheling depart-

ment employees or any of the other 4500 employees. The Petitioner believed they were all entitled to the increase and wanted them to have it. It would have been manifestly unfair for Petitioner not to include the busheling department employees. The Joint Council was not thereby deprived of any credit to which it was entitled, for it had nothing to do with the voluntary store-wide increase.

The Petitioner believes that it was legally entitled to file its application with the National War Labor Board for approval of the general salary increase for substantially all its employees, on the ground stated in its application, "To eliminate substandards of living in the lower salary brackets and to maintain the present payroll differentials" (R. 196B), recognized as exceptions to wage and salary stabilization under **Executive Order 9250**. The Petitioner was then contesting the claim of the Joint Council to be the exclusive bargaining agent for the 30 to 40 employees of the busheling departments, and it realized that the union might object to either the inclusion or the exclusion of those 30 to 40 employees in the said application. Therefore, the Petitioner advised the National War Labor Board of all the facts and stated its willingness to have these few employees in departments 280 and 281 either included or excluded. Thus, the Petitioner made it possible for the employees in these two departments to obtain the benefit of the increase under the stabilization order, but also made it possible for the Joint Council to exclude those employees from the application if the Joint Council felt that its interests would be better served (as apparently the Board felt they would be) by excluding them.

The entire subject of the application for approval by the National War Labor Board of the store-wide salary increase shows absolutely no motive on the part of the Petitioner except a legitimate business purpose at a time of acute manpower shortage, and the exercise by the Peti-

tioner of legal rights in furtherance of that business purpose. There is no evidence and no room for an inference that the Petitioner intended to deprive the union of any credit or otherwise to injure it. The Court below in its opinion referred to the fact that the union filed its charge with the Board on September 3, 1943; and that on September 11, 1943, the Petitioner's vice-president made an announcement to the employees in which he referred to the application then pending, and said (R. 190):

> "We sincerely hope that nothing will occur which will delay, or obstruct or prevent this approval."

The Court apparently drew an unfavorable inference from the chronology of these events (R. 271). But the Court overlooked the fact that the Petitioner had no knowledge of the charge filed by the Joint Council at the time the Petitioner's vice-president on September 11, 1943, made his statement to the employees. Although the charge was filed with the Board on September 3, 1943 (R. 26), as stated in the opinion, the Petitioner was not advised of it until September 23, 1943, when the Board issued its Complaint and Notice of Hearing (R. 28-32).

None of the announcements made by the Petitioner relating to the store-wide salary increase contained any reference to the employees in departments 280 and 281. The record shows (R. 189, 190) that the Board's Trial Attorney offered in evidence only those portions of the announcement of Sept. 11 which were quoted in the opinion (R. 271). The Board's Trial Attorney omitted to read into the record the remainder of that announcement which would have explained the reason for the language used. Then in the Court below for the first time it was inferred that the reference was to the charge filed by the union. The remainder of the announcement, which the Board could have introduced, would have shown to what the

quoted language referred, but the Board chose not to offer the entire announcement. In any event, the record in this case shows that notice of the filing of the charge was not given to the Petitioner until Sept. 23, long after the announcement of Sept. 11.

The Joint Council did not represent, or claim to represent, the more than 4500 other employees of the Petitioner's store and warehouses who were entitled to receive this general salary increase. There certainly might have been a claim of discrimination if the Petitioner had applied for approval of the increase for all the employees except the employees in departments 280 and 281. Therefore, the Petitioner placed the entire situation, with all the facts, before the National War Labor Board and stated its willingness to have the employees of departments 280 and 281 either included or excluded. Certainly that action should not furnish any basis for a charge of bad faith. The Board claims that the Petitioner did not act in good faith because it did not bargain with the Joint Council for departments 280 and 281 before filing the application for the store-wide salary increase, but Section 10 of the National Labor Relations Act gives to the employer the right to obtain judicial review of the Board's orders. It is said that the certification was valid when issued and although subject to review, it could not be disregarded pending a review. **The difficulty with that position is that the certification cannot be reviewed in any other way than by refusing to comply with it. American Federation of Labor v. National Labor Relations Board,** 308 U. S. 401, 409, 84 L. Ed. 347, 352.

The decision of the Board and the opinion of the Court below appear to mean that there was nothing the Petitioner might do, if it wished to preserve its right to judicial review of the certification, in order to avoid engaging

in an unfair labor practice, except to refrain entirely from filing any application for approval of a salary increase for any or all of its employees. We submit that such position is untenable and we do not believe that there is anything in the Act which justifies the holding that an employer may not file an application with the National War Labor Board for approval of a general salary increase for over **4500 employees** merely because a union has been certified as the representative of **30 to 40 employees**, and the certification is then being contested in court, as provided by Section 10 of the National Labor Relations Act.

D.

Paragraph 1. (b) of the Board's Order, as Modified by the Court and Ordered Enforced as so Modified, Is a Blanket Order Restraining the Petitioner Generally From Violating Section 7 of the Act. This Order Is Too Broad.

Paragraph 1 (b) of the Board's order, as modified by the Court and ordered enforced as so modified, provides that Petitioner shall cease and desist from:

> "(b) In any other manner interfering with, restraining, or coercing its employees **who are referred to in paragraph 1 (a)** in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act." (Emphasis supplied to show the words which were added by the Court to the Order as originally issued by the Board.) (R. 283-285.)

Although the order as so modified by the Court is limited in its application to the employees in the two busheling departments, it remains a blanket order to cease and desist

from all violations of the Act with relation to those employees. As issued originally by the Board, it was a blanket order against the Petitioner without any limitation. As modified by the Court, it is limited to the employees of two departments, but remains a blanket order restraining all violations of the Act. There is nothing in the record and nothing in the opinion of the Court below which under the law supports the broad language contained in the order, either as originally issued or as modified by the Court.

In the case of **National Labor Relations Board v. Express Publishing Co.**, 312 U. S. 426, the order sought to be enforced by the Board was for all practical purposes identical with the order in this case. This Court said:

> "It is obvious that the order of the Board, which when judicially confirmed, the courts may be called on to enforce by contempt proceedings, must, like the injunction order of a court, state with reasonable specificity the acts which the respondent is to do or refrain from doing. It would seem equally clear that the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct.
>
> . . . . . .
>
> "We hold only that the National Labor Relations Act does not give the Board an authority, which courts cannot rightly exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found. To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past."

The Board found, and the Court below sustained its finding, that the Petitioner had engaged in an unfair labor practice in refusing to bargain with the Joint Council pending the decision of the Court below. Also the Board found and the Court below sustained its finding, that the Petitioner had engaged in an unfair labor practice in filing its application with the National War Labor Board for approval of the general salary increase to more than 4500 employees in its St. Louis store. If, contrary to Petitioner's contention, there was a duty to bargain, then Petitioner contends its action in filing the application for approval of the salary increase was no more than an additional refusal to bargain with the Joint Council pending judicial review of the certification. Assuming, however, for the sake of argument, that two distinct unfair labor practices—(1) refusal to bargain and (2) the storewide salary increase—have been found by the Board and sustained by the Court, there is still no justification for the broad language contained in paragraph 1 (b) of the order.

The record here shows only that the Petitioner exercised the right given by Section 10 of the National Labor Relations Act to have the Court review the decision of the Board. That review could be obtained only by refusing to bargain. Hence, with respect to the refusal to bargain, the Petitioner's unfair labor practice was the only practice it could follow to obtain a judicial review of the Board's order. With respect to the other alleged unfair labor practice, the store-wide salary increase, here, also, there was shown no more than the Petitioner's failure to accept the certification by the Board pending a judicial review of that certification under Section 10 of the National Labor Relations Act.

Nothing in the Petitioner's conduct would justify an order restraining other violations which bear no resemblance to the Petitioner's refusal to recognize the Joint

Council pending a court review of the certification and the effort to obtain War Labor Board approval of the general salary increase. Nothing in the Company's conduct is evidence of any danger that the Company would commit any unfair labor practices in the future, and the Board did not find that it was justified in anticipating any future violation of the Act from the course of the Petitioner's conduct in the past.

In the case of **National Labor Relations Board v. Mason** (CCA 9), 126 F. 2d 810, the Court sustained the Board's finding that the respondent had engaged in unfair labor practices in discharging eleven employees in violation of Section 8 (3) of the Act, but it ordered the elimination of language similar to that contained in Paragraph 1 (b) of the Order under review here.

In the case of **National Labor Relations Board v. Newark Morning Ledger Company** (CCA 3), 120 F. 2d 262, the Board found, and the Court sustained the finding, that the respondent discharged the president of the local union because of her activity in behalf of the union. The Board ordered the reinstatement of the employee with back pay and the Board's order also contained language practically identical with the language of paragraph 1 (b) of the Board's order in this case. The Court enforced the portion of the Board's order which required reinstatement and back pay, but it ordered stricken out the blanket portion of the order restraining the respondent from committing any act in violation of the statute, and the Court said:

> "It is, however, now settled that in the absence of any finding that the unfair labor practices actually engaged in by an employer have been so persistent and varied as to justify the apprehension of continued similar and varied efforts in the future to interfere with the employees' right of self-organization and collective bargaining, the entry of a blanket order to

cease and desist from all violations of the act is not justified. National Labor Relations Board v. Express Publishing Co., 61 S. Ct. 693."

In the case of **Singer Mfg. Co. v. National Labor Relations Board** (CCA 7), 119 F. 2d 131, the Court sustained the Board's finding that the company had refused to bargain with the union and also found that the company had given wage increases to the employees while refusing to bargain with the union. The facts in that case are not similar to the facts involved here, because there the company was not seeking a judicial review of the Board's order but was meeting with the union and not bargaining in good faith, as the Board found. However, the two alleged unfair labor practices of which complaint is made here, refusal to bargain and granting a unilateral wage increase, were present in the Singer Manufacturing Company case and there the Court ordered the elimination from the Board's order of language similar to the language contained in Paragraph 1 (b) of the order under review here. The Court said:

"In the interest of certainty administrative orders and judicial judgments should be limited strictly to disposition of only such issues as are actually presented. The language of Mr. Justice Stone, in N. L. R. B. v. Express Publishing Company, 61 S. Ct. 693, 700, 85 L. Ed. ..., decided March 3, 1941, as follows, is applicable: 'The National Labor Relations Act does not give the Board an authority, which courts cannot rightly exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found. To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past. That justification is lacking here. To require it is no more onerous or embarrassing to the Board

than to a court. * * * An appropriate order in the circumstances of the present case would go no further than to restrain respondent from any refusal to bargain and from any other acts in any manner interfering with the Guild's efforts to negotiate.'

"So here the order appropriately should go no further than restrain petitioner from refusing to bargain and from any other acts in any manner interfering with United's efforts to negotiate. The order will be modified as indicated and, as modified, enforced."

Other decisions of the Circuit Court of Appeals, Seventh Circuit, to the same effect are the cases of **National Labor Relations Board v. Swift & Co.**, 108 F. 2d 988; **National Labor Relations Board v. Burry Biscuit Corp.**, 123 F. 2d 540; and **National Labor Relations Board v. Stone**, 125 F. 2d 752.

And the Eighth Circuit, United States Circuit Court of Appeals, has also refused to enforce provisions similar to Par. 1 (b) of the Order here in the cases of **Wilson & Co., Inc., v. National Labor Relations Board**, 123 F. 2d 411, and **American Smelting and Refining Co. v. National Labor Relations Board**, 126 F. 2d 680.

There are several quite recent cases in which the Courts have refused to order enforcement of orders similar to Par. 1 (b) of the Order in this case. In the case of **National Labor Relations Board v. Walt Disney Productions, Inc.**, 146 F. 2d 44, the Court sustained the Board's finding that the respondent violated Sec. 8 (3) of the Act, but the Court refused to enforce the portion of the order similar to paragraph 1 (b) here, and said:

"This command is but a repetition of the statutory rights of employees which employers are bound to respect. The employer cannot by such a blanket order be put in danger of being hailed into court upon a citation for contempt for any subsequently alleged violation of the Labor Act without accusation and trial before the Labor Board.

"The (b) portion of the Board's order is not justified as it enjoins acts entirely unrelated to any unfair labor practice engaged in by respondent. National Labor Relations Board v. Express Publishing Co., supra, 312 U. S. 426, 433-438, 61 S. Ct 693, 85 L. Ed. 930; National Labor Relations Board v. Newark Morning Ledger Co., 3 Cir., 1941, 120 F. 2d 262, 269, 137 A. L. R. 849. We decline to order enforced that part of the Board's order marked 1 (b)."

In the case of **National Labor Relations Board v. Cowell** (CCA 9), 148 F. 2d 237, the Court held that the evidence supported the Board's findings that the respondent had engaged in conduct which amounted to independent violations of Sec. 8 (1) of the Act and had violated also Sec. 8 (3) and Sec. 8 (5) of the Act. The Court said:

"Paragraphs 1 (a), 1 (b), 1 (c), 1 (d) and 1 (e) require respondent to cease and desist from the unfair labor practices found to have been engaged in by respondent. These paragraphs will be enforced.

"Paragraph 1 (f) requires respondent to cease and desist from 'In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid and protection, as guaranteed in section 7 of the Act [29 U. S. C. A., Sec. 157].' This, in effect, is a blanket order restraining respondent from violating the statute in any manner. We think such a blanket order unwarranted and decline to enforce it."

In the case of **National Labor Relations Board v. Gilfillan Bros., Inc.** (CCA 9), 148 F. 2d 990, the Court held that the evidence supported the Board's finding of violation of Sections 8 (2) and 8 (1) of the Act, but the Court

modified the Board's order by striking out the blanket provision similar to 1 (b) here.

In the case of **National Labor Relations Board v. Lipshutz** (CCA 5), 149 F. 2d 141, the Court held that the evidence amply supported the Board's finding that the respondent had engaged in unfair labor practices under Section 8 (1) of the Act by making anti-union statements and by threatening employees with economic reprisals, but the Court said:

> "Respondent complains that the cease and desist order of the Board is too broad; that it should order him only to cease and desist from the unfair labor practices of the kind found by the Board to have been committed by him. In this we concur. When sustained by the court, the order is in effect an injunction, hence it must be exact and specific in what it requires or forbids. Hughes Tool Company v. N. L. R. B., 5 Cir., 147 F. 2d 69, and authorities cited. The order requires the respondent to cease and desist from in any manner interfering with, restraining or coercing his employees in the exercise of those rights and those activities guaranteed to them in Section 7 of the Act. The order must be modified so as to limit its full effect to the restraint of the unfair labor practices found to have been committed by the respondent and other related unlawful acts. N. L. R. B. v. Express Pub. Co., 312 U. S. 426."

It seems plain that the decision of the Court below in ordering the enforcement of paragraph 1 (b) of the order is in conflict with the controlling decision of this Court and with the decisions of other Circuit Courts of Appeals, and is clearly erroneous. The action of the Court below in modifying the Board's order did not correct the error. It limited the application of the erroneous portion of the order to those employees in the two busheling departments, but it remains a blanket order restraining the Peti-

tioner from acts which it is not claimed that Petitioner committed. And there is no basis in Petitioner's past conduct to suggest that other violations of the Act should be anticipated. It is therefore respectfully submitted that paragraph 1 (b) of the Board's order, as modified by the Court, should be eliminated, or at least modified so that it will be limited to the alleged unfair labor practice found by the Board.

Conclusion.

It is respectfully submitted that the Decision and the Decree of the Court below should be reversed. The action of the Board in finding that the Joint Council had membership, and presumably substantial membership, among the employees when the evidence was all to the contrary, and in so conducting the election as to hold out to the employees that a substantial number of their fellow employees were members of the Joint Council when, in fact, as the Board well knew, not one of the employees was a member of the Joint Council, was bound to have influenced the result of the election, and was arbitrary, unreasonable and capricious. The certification of the Joint Council therefore was unlawful and void.

The action of the Board in establishing a bargaining unit, composed of 30 to 40 employees in two out of several alteration departments, sought by the Union to gain an advantage in its campaign to organize the entire store, unit by unit, and to file a series of election petitions, where there are more than 350 departments in the store and there are two competing labor organizations undertaking to organize all the employees of the store, was unreasonable, arbitrary and capricious. Such action would cause an undue and unreasonable burden upon the Petitioner and was unlawful and void.

The action of the Board in finding that the Petitioner's application to the National War Labor Board for approval

of the general salary increase for approximately 4500 employees of the Company's store and warehouses, including the 30 to 40 employees in departments 280 and 281, was a separate violation of Section 8 (1) of the Act, was not supported by any evidence and the order of the Board made upon such finding was unlawful and void and should not be enforced.

The action of the Board, as modified by the Court below, in ordering the Petitioner to cease and desist from in any other manner interfering with, restraining or coercing its employees in departments 280 and 281 in the exercise of their right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid and protection, as guaranteed by Section 7 of the Act, was too broad and comprehensive in any event. Paragraph 1 (b) of the Board's order, as modified by the Court below, should be eliminated, or at least modified so that it will be limited to the alleged unfair labor practice found by the Board.

The Decision and Decree of the Court below should be reversed and the Court should be directed to enter an order denying enforcement of the Board's order or at least modifying such order so that it will conform to the law.

Respectfully submitted,

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APPENDIX.

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C., Sec. 151, et seq.) are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: **Provided,** That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony and proceedings set forth in such transcript.

Sec. 10 (e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice

thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

MAY DEPARTMENT STORES COMPANY, Doing Business as FAMOUS-BARR COMPANY,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD.
No. 39.

REPLY BRIEF FOR PETITIONER.

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STATEMENT.

On page 4 of the Brief for the Board, in Note 1, it is said that the employees in the two departments, Nos. 280 and 281, involved in this case are bushelmen, and there is a reference to the Dictionary of Occupational Titles for a definition of "bushelman" as "a general tailor." The employees in these departments are not all tailors or bushelmen, but they include fitters, markers, tailors, tailoresses, finishers, pressers, operators, examiners and rippers (R. 109).

On page 6 of the Board's Brief, in Note 3, it is said that as a result of collective requests by the employees in De-

partment 280, 75 per cent of them received a salary increase in 1941 and all received an increase in 1942. The record shows that the salary increases received by these employees were not in accordance with any request for a specific increase but were on an individual basis and were not all the same flat amount or the same percentage (R. 145, 100).

On page 11 of the said Brief references are made to Petitioner's announcements of September 1, 1943, and September 3, 1943, and it is said that in both announcements Petitioner "**stressed**" the voluntary nature of the increase and the fact that the retroactive increase would be paid in a lump sum. The announcements which are set forth in full in the record (R. 204-206A) show no such stress.

On page 12 of the said Brief it is said that Petitioner's vice president did not explain what prompted him to make the announcement of September 11, 1943. The record shows that the Board's Attorney selected from that announcement and read into the record only three sentences (R. 189-190). The Board cannot now say that Petitioner did not explain what prompted the announcement, since the record does not show whether or not such explanation was made. Obviously, the Board offered these fragments of the announcement of September 11 only for the purpose of showing that the application for approval of the increase was made known to all the employees. The Board's Attorney asked Petitioner to stipulate, as follows:

> "The application referred to in the last quoted portion of the speech has reference, does it not, Mr. Tucker, to the War Labor Board wage application?
>
> "Mr. Tucker: That is right" (R. 190).

A.

The Joint Council.

The Brief for the Board significantly ignores the Petitioner's Specification of Error No. 1 and its argument under "A." We can only assume that the Board could not answer Petitioner's argument that the action of the Board in holding the election, with the Joint Council as the only name on the ballot, on its order which contained the improper finding that the Joint Council had membership among the employees, destroys any presumption of validity which might otherwise attach to the Board's certification, and was arbitrary, unreasonable and capricious.

The Board could not dispute the facts that not one employee had designated the Joint Council as his representative (R. 89-90); that the employee, Verderber, a member of the Master Committee of the Local, who testified, did not know of any relationship between the Local and the Joint Council until about a month before the hearing (R. 101); that the filing of the petition by the Joint Council was concealed from the employees and that the Union misrepresented the fact to the employees and misquoted the official Board notice and repeatedly stated that the petition had been filed by Local 372 (R. 161-164).

The Board could not dispute the fact that in the face of all the evidence to the contrary, it held out to the employees that a substantial number of their fellow employees were members of the Joint Council, and the Board does not even contend that this arbitrary action on its part did not influence the result of the election.

The Board says that it is not concerned with the "technicalities of the laws of agency," and that it was not required to determine the representative status of the Joint Council, but it does not attempt to deny or explain the proof that it consciously misrepresented the facts and influenced the result of the election.

The Board says that the Petitioner cannot complain of the Board's arbitrary action, but Section 9 (d) of the Act provides for a review of the Board's action in a representation case when that action becomes the basis of a complaint and order against the employer under Section 10 of the Act.

Petitioner submits that the Board did not defend its action because there was no defense available to it.

B.

The Unit.

The Brief for the Board on page 62 quotes from Section 9 (b) of the Act the statutory standard for the Board's guidance in unit determinations, as follows:

> "to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act."

But the Board, significantly, ignores the fact pointed out by Petitioner that the unit in this case was admittedly not for the benefit of the employees in the unit, but to aid one of two competing labor organizations conducting rival campaigns to organize the entire store. The CIO publicly stated: "**New Plan of Action.** Local 372-CIO has filed a petition for an election for all the tailors. This is the first of a series of election petitions for various groups of employees. Others will follow shortly." * * * "Remember. This new plan in no way conflicts with our final goal of a 100% Union store. We believe this new approach may do the job faster." * * * "By this new plan of action we are not dividing the employees into different local unions. Local 372 will remain the one union in the store" (R. 163). And, "Where we will petition next depends upon only one thing. That is which group is ready next" (R. 166).

The reference on page 65 of the Board's Brief to a subsequent election should not be considered in this case. The

Petitioner is precluded from showing the true facts involved in the case mentioned by the Board because they are outside the record in this case. Doubtless it is proper to refer to reported decisions of the Board for the purpose of showing administrative practices of the Board, but certainly the Board may not introduce in this Court as facts its own statements made in other cases which are not before this Court and as to which the Petitioner is unable to reply.

The Board's Brief states, on page 66, that "Petitioner's fears that the operations of its store may be disturbed by a long series of elections each conducted on a craft basis are wholly speculative." We submit that there is nothing speculative about Petitioner's fears. The Union has said in so many words that there will be a long series of elections, not on a craft basis, it is true, but on the basis of which department is "ready next." And the Petitioner has no reason to believe that the A. F. of L. will not follow the example of the CIO.

The Board says (Br. 67) that there is no inconsistency between its partial reliance on the physical separation of the busheling departments from the department where women's clothing is altered and its disregard of the fact that Department No. 280 on the second floor is physically separated from Department No. 281 in the basement. The inconsistency seems clear. And on page 67 of its Brief the Board, without denying inconsistency, states as a reason for excluding the women's alteration department that another union claimed in 1942 to represent employees in that department, but disregards the fact that in this very case the A. F. of L. claims the right to represent the employees of the busheling departments in a store-wide unit (R. 5, 6). The Board denies that its action in grouping in one unit the employees engaged in altering men's and women's and boys' clothing in the case of J. L. Brandeis & Sons, 47 NLRB 614, 617, shows impropriety in excluding the

women's alteration employees from the unit in this case. But the Board makes no attempt to answer the Petitioner's contention that the Brandeis case and the case of Matter of May Department Stores Co., 39 NLRB 471, 478, together with other evidence in the case, disproves the Board's statement that traditionally men's and women's alteration workers in retail stores have been represented by separate craft unions.

C.

The Application for Approval of the Store-Wide Salary Increase.

The Brief for the Board contends with many citations that, assuming its certification of the Joint Council was valid, the Petitioner was under a duty to bargain with the Joint Council for wages, hours and working conditions of the employees in the unit, and that the Petitioner failed in that duty when it stated its willingness to include the employees in these two departments with 4500 other employees of the store in the application for approval of a store-wide salary increase. But this adds nothing to the fact that the Petitioner had expressly refused to bargain with the Joint Council in its letter of July 19, 1945 (R. 194) in which it stated that it would contest the Board's jurisdiction and the certification and the unit by the only means the law provides, which is by refusing to bargain. The cases cited by the Board do not hold that the granting of a wage increase, without more, is an independent violation of Section 8 (1) of the Act, but only that it may prove refusal to bargain.

The Brief for the Board, on page 21, states that in the case of Medo Photo Supply Corp. v. N. L. R. B., 321 U. S. 678, "The Court held that the employer, 'by ignoring the union as the employees' exclusive bargaining representative' when making a change in wage rates, had violated

Section 8 (1) of the Act." The Board has misinterpreted the Court's opinion in that case. The Court held that the employer had violated Section 8 (1) of the Act by **negotiating** with the employees and "quite apart" therefrom had also violated that section of the Act by granting an increase, in response to an offer of the employees, **to induce them to leave the union.**

The Board in its Brief (p. 30) recognized and stated the full effect of Petitioner's application for approval of the salary increase and the announcement thereof when it said "and just as individual bargaining is outlawed as the antithesis of collective bargaining, unilateral settlement is necessarily outlawed as the antithesis of bargaining itself." From and after July 19, 1943, the Petitioner refused to bargain with the Joint Council, and this refusal was the only means by which the Petitioner could obtain a review of the certification and the determination of the unit and the question which was then undecided as to whether or not the Board had jurisdiction over a retail store. The Petitioner's filing the application for the store-wide salary increase and the announcement thereof, without first bargaining with the Joint Council as to the employees of Departments 280 and 281, was certainly no more than a continuation of Petitioner's refusal to bargain.

The Board states in plain language (p. 22), "The Board's finding turns not on the motive for the particular change in terms of employment but solely upon the unilateral nature of its effectuation."

Until the Court below mistakenly inferred that the fragments of remarks made by Petitioner's vice-president on September 11 referred to the charge filed by the Joint Council on September 3 (R. 271), the Board had never made any claim that the Petitioner had done more than file the application for approval of the store-wide salary increase and announce the filing to all its employees, with-

out any reference to the employees in Departments 280 and 281, except as they were included in the term "all full time regular and extra employees, selling and non-selling" (R. 204-206A). The Complaint in this case contained only the following allegation with respect to the filing of the application and the announcement thereof:

> "From on or about August 31, 1943, respondent, by its officers, agents and employees, while engaged at the store, as described above, did take steps unilaterally to secure the necessary approval of the National War Labor Board of certain changes with respect to wages, rates of pay, hours of employment and other conditions of employment of the employees in the unit; and did on or about September 1, 1943, seek to undermine the union's majority representation in the unit by informing all employees engaged at its store that respondent had unilaterally taken such steps and intended in the future to take other steps to secure necessary approval of the National War Labor Board therefor" (R. 30-31).

Although this Complaint was issued on September 23, 1943, after the announcement of September 11, 1943, that announcement was not even mentioned in the Complaint on which this case was tried.

The Trial Examiner, whose report was adopted as the only findings of the Board (R. 45), found with respect to the announcement of the applications only as follows:

> "The respondent, subsequent to the filing of its application, by speeches of its superintendent of employment, Griffith McCarthy, and its vice president and general manager, Fred J. Salomon, and through its publication, Store Chat, published to its employees, including employees of the unit in which the Union had been certified as bargaining representative, an account of its unilateral efforts and progress in obtaining approval of its proposed wage increases" (R. 52).

Thus it appears certain that the Board at no time suggested that the Petitioner had done more than file the application and announce to all the employees that the applications had been filed.

However, the Board now states on page 34 of its Brief that the Petitioner "intimated in a speech over the store's public address system that the projected wage increase might be jeopardized if the Union took any steps to vindicate its position as bargaining agent (R. 189-190)." These record references are to the statement made by the Petitioner's vice president over the public address system on September 11, 1943, only portions of which were read into the record by the Board's Attorney at the hearing. They contain no reference whatsoever to the Union and the intimation claimed by the Board is **wholly** without foundation.

As previously pointed out, the record shows that the filing of the Charge in this case by the Joint Council on September 3, 1943, was not disclosed to the Petitioner until September 23, 1943 (R. 28-32), and neither the Petitioner's vice president nor the employees who heard his remarks on September 11, 1943, could have construed his remarks as an intimation that any action of the Union might jeopardize the proposed salary increase. The Board's Attorney who read into the record the reference to the pending applications in the remarks of September 11 (R. 189-190) could, and doubtless would, have read any other portions of those remarks which might have contained any intimation that action by the Union would jeopardize the pending applications. The record shows no such intimation and the decision of the Board makes no such claim.

The Board's Brief, on page 33, contains a speculation on the possibility that the proposed $2.00 per week store-wide increase might prevent the employees of the busheling departments under war conditions from securing any additional increase through the efforts of the Union. This is pure speculation without any foundation whatsoever.

The Board's Brief, on page 37, says "Petitioner could have bargained with the Union concerning the proposed increase insofar as it concerned the employees in the unit and filed a joint application for a wage increase with the Union, while at the same time continuing to refuse to recognize the Union generally." That statement ignores the decision of this Court in the case of **American Federation of Labor v. N. L. R. B.**, 308 U. S. 401, 409, which held that a certification can be reviewed only if the employer refuses to recognize the certified union, and a complaint and order against the employer for refusal to bargain is issued by the Board. No explanation is offered by the Board of its proposal that the Petitioner could bargain with the Joint Council while at the same time refusing to bargain with the Joint Council.

Appendix B to the Brief for the Board shows that the Regulations of the National War Labor Board in effect when the Petitioner filed the application in this case required only the disclosure of whether or not there was a "duly recognized collective bargaining agency," and that the addition of a "labor organization which has been certified by the National Labor Relations Board" was by an amendment of October 1, 1943, after the application in this case had been filed. Nevertheless, the Petitioner made full disclosure of all the facts and stated its willingness that the employees of Departments 280 and 281 should be either included or excluded from the application at the election of the Union (R. 195).

The Board's reference on page 38, Note 30, of its Brief to subsequent proceedings before the War Labor Board, which are outside the record of this case, should not be considered. Petitioner is precluded from showing the actual facts with respect to these proceedings, because the record is not here.

On page 36 of the Board's Brief it says that Petitioner contends, in effect, that its original refusal to bargain with

the Joint Council immunized it from the consequences of further attacks upon the employees' rights. And the Board, having set up that contention, answers it by saying that each invasion of the rights of employees is a separate violation of the Act. But the Board has misinterpreted our position, which is that the failure of the Petitioner to bargain with the Joint Council for the employees of Departments 280 and 281 before Petitioner filed its store-wide application with the War Labor Board was but a continuation of its refusal to bargain with the Joint Council which had been stated clearly in Petitioner's letter of July 19, 1943, to the Joint Council (R. 194). The substance of the Board's argument in its Brief, and the cases which it cites, is merely that where there is a duty to bargain, the granting of a unilateral wage increase is evidence of refusal to bargain. In this case, if Petitioner is correct that there was no duty to bargain with the Joint Council, then of course the filing of the application for War Labor Board approval of the wage increase and the announcement thereof were unobjectionable. But if Petitioner should be held to have been under a duty to bargain with the Joint Council, the filing of the application and the announcement thereof amounted to nothing more than cumulative evidence of Petitioner's refusal to bargain, which requires no proof in addition to Petitioner's letter of July 19, 1943 (R. 194).

Petitioner did nothing to interfere with the rights of the Joint Council or the rights of the employees of Departments 280 and 281 under the Act and nothing in the Record in this case could possibly be construed to be a violation of Section 8 (1) of the Act.

D.

The Scope of the Order.

The Brief for the Board attempts to distinguish this case from the controlling decision of this Court in the case of **National Labor Relations Board v. Express Publishing Co.**, 312 U. S. 426, by stating on page 41:

> "But here, the Board found an independent, serious, and far-reaching violation of Section 8 (1), quite apart from the refusal of petitioner to bargain."

We submit that even if the Petitioner had a duty to bargain with the Joint Council, the record in this case shows no more than a refusal to bargain and a violation of Section 8 (5) of the Act. But even if there were an independent violation of Section 8 (1), the blanket-paragraph 1 (b) of the Board's order, as modified by the Court below, should not be enforced.

The Board says that the Petitioner has not proposed a substitute for paragraph 1 (b) of the Board's order. That is true. Petitioner contends that no order should be made or enforced against it. But if the Court should determine that a substitute for paragraph 1 (b) of the Board's order should be entered, the order directed by this Court to be entered in the Express Publishing Co. case would be appropriate.

The Board suggests four categories into which it says alternative orders of the Board might roughly fall; and as to each such category the Board states its objections which are all to the effect that the employer conceivably might in the future engage in some conduct which the Board would believe to be a violation of the Act but which would not be within the scope of the order. This according to the Board would require a new complaint and a new proceeding before the Board, all of which could be avoided if the Court would enforce an order as broad as the Act. It con-

tends that such a broad order should not depend for enforcement upon any showing "that the employer could be expected again to commit unfair labor practices in the future" (Br. 48). Its argument, that after it has once decided that an employer has violated the Act the employer should thereafter be subject to contempt proceedings on any claim the Board might make of any violation of the Act however unrelated to the original violation, is colorfully stated, as follows:

> "The legislative history of the enforcement provisions of the Act makes it clear that Congress did not intend to give an employer who had violated the Act a 'second free bite at the apple'" (Br. 47).

The argument of the Board's Brief that its blanket orders should be enforced was clearly and forcefully rejected by this Court in the Express Publishing case when it stated:

> "It is obvious that the order of the Board, which when judicially confirmed, the courts may be called on to enforce by contempt proceedings, must, like the injunction order of a court, state with reasonable specificity the acts which the respondent is to do or refrain from doing. It would seem equally clear that the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct."

The Board's argument has also been fully answered by the many decisions of the Circuit Courts of Appeals cited in our original brief and in the Board's brief.

In a weak effort to show varied violations of the Act by the Petitioner, the Board said on page 49 of its brief that

Petitioner had engaged in **three** unfair labor practices, which it describes as follows:

> "the unilateral wage increase, the written and oral statements, and refusal to bargain collectively."

The Board has overlooked the fact that in this case it has been neither charged nor found that the Petitioner did actually increase any wages, but only that it filed an application with the National War Labor Board for approval of a proposed increase. (R. 30-31), and the record in this case does not show the action of the War Labor Board on the application. So that even if the filing of the application and the announcement to the employees taken together could be considered an independent violation of the Act, they certainly could not be considered two independent violations of the Act. Moreover, the Board has stated, as a reason for enforcing its broad order, that all the acts of the Petitioner of which complaint is made in this case stemmed from its opposition to collective bargaining by the bushelmen as a group (Br. 49).

Attention should be called to the inaccurate statement of the Board that this Court in the Express Publishing Company case said that even a refusal to bargain might warrant an order as broad as the Act if the Board made a "finding based either on the specific circumstances disclosed by the record or on its own expert judgment of their relation to the policy embodied in Section 7, or as to any relationship or probable relationship of respondent's refusal to bargain and the other types of unfair labor practices some of which are enumerated in Section 8" (Br. 53). The opinion of the Court does not support the Board's statement. The Court did note that no such finding was present in the Express Publishing Co. case, but far from saying that the Board could, without evidence, in the record, restrain an employer from acts unrelated to those

found to have been performed, the Court said that the Board could not "restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct."

Finally, the Board argues, on page 57 of its brief, that reliance may be placed on its discretion not to institute contempt proceedings if the employer should be in genuine doubt as to what acts were prohibited by its order and the Court's decree. This Court said in the case of **J. I. Case Co. v. N. L. R. B.**, 321 U. S. 332, 341:

> "Questions of construction had better be ironed out before enforcement orders issue than upon contempt proceedings. A party is entitled to a definition as exact as the circumstances permit of the acts which he can perform only on pain of contempt of court. Nor should he be ordered to desist from more on the theory that he may violate the literal language and then defend by resort to the Board's construction of it."

The Board's reference in its Brief, on page 61, note 45, to other Board cases in which Petitioner was a party is to matters outside the record of this case. The Board may not go outside the record of this case to make statements of alleged facts and support its statements by references to its own statements in other cases which are not before this Court.

CONCLUSION.

It is respectfully submitted that the Brief for the Board has failed to support the Board's order as modified by the Court below. It is submitted that the certification of the Joint Council was unlawful and void; that the determination of the unit was arbitrary, unreasonable and capricious and that there is no evidence in the record to support the Board's finding of an independent violation of Section 8 (1)

of the Act and, finally, that the Board's order is too bro and comprehensive in any event. It is submitted that t decision and decree of the Court below should be revers and the Court below should be directed to enter an ord denying enforcement of the Board's order, or at least mo fying such order so that it will conform to the law.

Respectfully submitted,

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No. 971

In the Supreme Court of the United States

OCTOBER TERM, 1944

MAY DEPARTMENT STORES, DOING BUSINESS AS FAMOUS-BARR COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 4, 7–18)[1] is reported in 146 F. (2d) 66. The findings of fact, conclusions of law, and order of the National

[1] In referring to the record the same method is used as that followed in the petition for certiorari, except that page references within a particular volume are not bracketed (Pet. 2). References to Volume 1, containing the pleadings, the Board's determination in the representation case, and its decision and order in the complaint case together with the petition to enforce and answer in the court below, are designated "(R. 1, —)." References to Volume 2, printed by peti-

Labor Relations Board (R. 1, 52–64) are reported in 53 N. L. R. B. 1366. The decision and direction of election in a prior representation case which forms part of the record in this case (R. 1, 9–15) is reported in 50 N. L. R. B. 669. The certification of representatives issued by the Board following the election (R. 1, 28–29) is unreported.

JURISDICTION

The decree of the court below (R. 4, 33–35) was entered on January 11, 1945. The petition for a writ of certiorari was filed on February 21, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether it is an unfair labor practice under Section 8 (1) of the Act for an employer, without notifying or affording the certified exclusive bargaining representative of the employees in an appropriate unit an opportunity to negotiate, uni-

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tioner as an appendix to its brief in the court below, are designated "(R. 2, —)." References to Volume 3, printed by the Board as an appendix to its brief in the court below, are designated "(R. 3, —)." References to the volume containing the opinion of the court below, petitioner's petition for rehearing, the order of the court below modifying the Board's order, the decree, petitioner's motion for a stay and the order staying the issuance of a certified copy of such decree, are designated "(R. 4, —)."

laterally to take action respecting wage increases for such employees.

2. Whether the cease and desist provisions of the Board's order which were sustained by the court below are proper in view of the Board's findings.

3. Whether the Board could properly find that the employees in petitioner's bushelling rooms constitute a unit appropriate for collective bargaining within the meaning of Section 9 (b) of the Act.

4. Whether the Board could properly certify as exclusive bargaining representative of employees in an appropriate unit a labor organization which received a majority of the votes cast in a Board-conducted election where the Board decided that the holding of an election was warranted by the petitioning union's showing that a substantial number of employees in the unit had authorized its affiliate to represent them for purposes of collective bargaining.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the appendix, pp. 21–28.

STATEMENT

Pursuant to a petition filed by St. Louis Joint Council, United Retail, Wholesale and Department Store Employees of America, affiliated with the Congress of Industrial Organizations, herein

called the Union (R. 1, 3–5), the Board conducted a hearing and on June 16, 1943, issued its Decision and Direction of Election in which it found that all of petitioner's employees "working in the busheling room, second floor, Department 280, and in the busheling room, basement, Department 281, including regular extra employees but excluding the two foremen and all other employees of the Company, constitute a unit appropriate for the purposes of collective bargaining" (R. 1, 14). The evidence in support of this finding (R. 1, 12–13) may be summarized as follows:

Petitioner owns a retail department store in St. Louis, Missouri. In the departments of its store numbered 280 and 281, variously called busheling rooms, alteration rooms, or tailor shops (R. 2, 5–6), alterations and repairs are made on men's and boy's suits, overcoats, trousers, and sportswear sold to customers (R. 2, 2, 51). In department 280, located on the second floor balcony in a segregated space (R. 2, 2–4), approximately 27 busheling employees are regularly employed mending and altering clothes sold to customers on the same floor (R. 3, 8–9; R. 2, 51–52). In department 281, located in the basement, three regular employees (R. 3, 9; R. 2, 40) are engaged in mending and altering clothing sold in the basement (R. 2, 5–6, 42–43). Such employees have special hours of work which differ in starting time and length of lunch period from those of the salespeople, clerks, wrappers, and cashiers (R. 2,

4–5). Bushelmen are classified according to their functions, as fitters, markers, tailors or tailoresses, finishers, pressers, operators, examiners, and rippers (R. 3, 15; R. 2, 41). Except for the fitters, who mark the clothes for alteration on the customers, the bushelmen apparently have no contact with petitioner's customers or sales employees (R. 2, 2–4, 46, 48–49, 51–52; R. 3, 8). Bushelling is regarded as skilled work and as a trade (R. 3, 14–15; R. 2, 44–45, 48, 57).

For about 10 years, between 1910 and 1920, the bushelmen of all department and retail clothing stores in St. Louis, including petitioner's store, were organized and were represented by a local of the Journeymen Tailors Union (R. 3, 10–13, 17, 21; R. 2, 36–37, 69) which had a contract with an employers' association of which petitioner was a member (R. 3, 13–14, 17; R. 2, 69). While the bushelmen had not been represented by any union between 1920 and 1942 (R. 2, 2, 6; R. 3, 2),[2] the organization of bushelmen on a craft basis is common in the clothing industry (R. 3, 12–15). The bushelmen were fully organized, had expressed a desire to be represented in a separate unit (R. 2, 13–15), and no labor organization claimed to rep-

[2] There was evidence that the bushelmen had, in 1941 and 1942, while they were not represented by any union, collectively asked for and received raises in pay (R. 3, 3–4, 7–8; R. 2, 12–13). As a result of their requests, about 75 percent received a raise in 1941 and all received a raise in 1942 (R. 2, 74–75, 79).

resent petitioner's employees on a more comprehensive scale (R. 1, 13).

On the basis of the foregoing facts, the Board rejected petitioner's contention that a store-wide unit would alone be appropriate and, applying its "extent of organization" theory,[3] concluded that "collective bargaining should be made an immediate possibility for the employees in the busheling rooms without requiring them to await the uncertain date when the employees may be organized in a larger unit." (R. 1, 13.)

The Board also rejected petitioner's contention that a unit of employees in the busheling rooms would be inappropriate unless it included the employees in the women's alteration department and in the fur work room (R. 1, 13). The Board pointed out that "there is historically a sharp demarcation between the trades involved," and that not only were the women's clothing alteration workers located in a different part of the store from the men's (R. 2, 3, 55) but that there was no substantial interchange of employees from one to the other (R. 2, 7–10, 80–81, 83).[4]

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[3] See National Labor Relations Board, *Third Annual Report* (Govt. Print. Off., 1939), pp. 157–158; *Fourth Annual Report* (Govt. Print. Off., 1940), pp. 83–84; *Sixth Annual Report* (Gov't Print. Off., 1942), p. 63; *Matter of R. C. A. Communications, Inc.*, 2 N. L. R. B. 1109, 1115; *Matter of Gulf Oil Corp.*, 4 N. L. R. B. 133, 137; *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 132–135.

[4] Such few transfers as did occur were either permanent (R. 2, 80) or were intended to reduce the size of the busheling force (R. 2, 73).

In accord with the Board's usual practice of proceeding with an investigation of a question concerning representation only where a substantial number of the employees in the appropriate unit have shown an interest in being represented by the labor organization involved,[5] there was introduced at the hearing a report of the Board's Regional Director (R. 2, 85–87) which recited that the Union had submitted authorization cards signed by a large number of employees in the unit.[6] On the basis of this report the Board concluded that the holding of an election was warranted (R. 1, 11), and directed that an election be conducted to determine whether the employees in the unit desired to be represented by the Union, or by the American Federation of Labor, or by neither (R. 1, 15).[7] The election was held on June 29, 1943, and 36 votes were cast for the Union and one

[5] See National Labor Relations Board, *Eighth Annual Report* (Gov't Print. Off., 1944), p. 44; *Sixth Annual Report* (Gov't Print. Off., 1942), p. 55.

[6] The authorizations ran to the United Department Store Employees Union, affiliated with the United, Retail, Wholesale and Department Store Employees of America, C. I. O. (R. 1, 86), which is one of the locals affiliated with the Union (R. 2, 37–38). The Union, as the Board found, represents its local affiliates in collective bargaining (R. 1, 11; R. 3, 6).

[7] The Board directed that the name of the American Federation of Labor appear on the ballot despite the fact that that organization presented no evidence that it had been authorized to represent any employees in the unit involved (R. 1, 14–15). The A. F. of L. was subsequently permitted to withdraw and its name did not appear on the ballot (R. 1, 26).

against (R. 1, 28). The Board accordingly certified the Union as the exclusive bargaining representative of all the employees in the unit (R. 1, 28–29).

Thereafter, on December 17, 1943, upon the usual proceedings, the Board issued its decision and order finding that subsequent to the certification petitioner had refused to bargain with the Union in violation of Section 8 (5) of the Act and that by other conduct petitioner had violated Section 8 (1) of the Act (R. 1, 52–64). The evidence in support of these findings may be summarized as follows:

On July 8, 1943, the Union requested petitioner to bargain concerning wages, hours and working conditions for the employees in the appropriate unit (R. 2, 186). Petitioner, on July 19, 1943, rejected this request assertedly because the unit was not appropriate for collective bargaining (R. 2, 186–187).

On August 31, 1943, without consulting the Union, petitioner made application to the National War Labor Board for approval of voluntary wage and salary adjustments which would increase the wages of all its employees, including those represented by the Union as exclusive bargaining agent, effective retroactively to August 2, 1943 (R. 2, 189–192). A form submitted with the application required the applicant to list the groups of employees whose wages had been nego-

tiated or were then the subject of negotiation with labor organizations and the names of such organizations (R. 2, 193). Petitioner listed the electricians, carpenters, painters, and plasterers and their collective bargaining representatives but not the bushelmen and the Union (R. 2, 193). In a letter accompanying the application,[3] petitioner stated (R. 2, 188):

> The application which covers the employees at the store shows that we have Union contracts and working agreements which cover certain craftsmen, including electricians, painters, carpenters, and plasterers. These employees, being covered by collective bargaining agreements, are excluded from this application.

Petitioner further stated that the Union represented the employees in the busheling rooms and had been certified by the Board, but that the applicant viewed the unit as inappropriate and intended to disregard the Board's certification and to test its position in the court. It stated that it had neither recognized nor bargained with the Union and intended to include the busheling employees in it application. Finally, it stated that it did not believe that the Union had "any interest whatever in the enclosed application" but that, in the event that the Union should object to the inclusion of the busheling

[3] Two applications were submitted covering different groups of employees (R. 2, 187–188).

employees, the application should be considered amended so as to include them.

Thereafter, on September 1, 1943, petitioner's superintendent of employment announced to the employees the filing of this unilateral application over a public address system in the store (R. 2, 178–179, 201–202), and a further announcement to the same effect appeared in petitioner's store newspaper on September 3, 1943 (R. 2, 203). On the same day, September 3, the Union filed a charge that petitioner on July 19, 1943, had refused to bargain and had thereafter taken the unilateral action described above (R. 1, 30). Subsequently, on September 11, 1943, petitioner's vice-president made a speech to the employees over its public address system in which he stated that he had no news as to the status of the application and that he "sincerely hope[d] that nothing will occur which will delay or obstruct or prevent this approval" (R. 2, 182).

The Board found[*] (R. 1, 58–59) that petitioner, on July 19, 1943, and thereafter, had refused to bargain collectively with the Union in violation of Section 8 (5). The Board further found (R. 1, 60) that petitioner's action "in ignoring the Union while attempting to win approval of its proposal for wage increases, and in publishing the facts of its unilateral action to its

[*] The Board adopted, without restating them, the findings and conclusion of the Trial Examiner who conducted the hearing (R. 1, 52–53).

employees, including employees represented by the Union, had the effect of depriving the Union of credit which normally would accrue to it, and of nullifying its efficacy as a bargaining agent. The said action may, therefore, reasonably be said to have undermined the Union among employees for whom it had been certified as bargaining representative, and to have discouraged employees generally in their union affiliation." The Board concluded that by this course of conduct petitioner had violated Section 8 (1) of the Act (R. 1, 61, 62). It ordered petitioner; *inter alia,* to cease and desist from refusing to bargain with the Union and from in any manner interfering with, restraining, or coercing its employees in the exercise of their rights as guaranteed in Section 7 of the Act (R. 1, 53–54).

On March 14, 1944, the Board filed in the court below a petition to enforce the Board's order (R. 1, 64–67). On December 20, 1944, the court entered its opinion (R. 4, 7–15) and on January 11, 1945, its decree enforcing the Board's order with a modification not here material (R. 4, 33–35).

ARGUMENT

1. Petitioner's contention that the Board erred in finding that petitioner had violated Section 8 (1) of the Act by disregarding the certified representative of its employees and taking unilateral action affecting their wages (Br. 25–30, 19–20) is based upon a misconception of the holding in

Medo Photo Supply Corp. v. *National Labor Relations Board*, 321 U. S. 678. Petitioner asserts (Br. 27) that the Court there held the unilateral grant of a wage increase without reference to the employees' exclusive bargaining representative to be an unfair labor practice "only because" the increase "was granted in response to an offer of the employees, to induce them to leave the Union." The opinion, on its face, refutes this interpretation. The Court explicitly held that "negotiations by [the employer] for wage increases with any one other than the union, the designated representative of the employees, was an unfair labor practice" (321 U. S. 678, 683), and that "Such conduct is * * * an interference with the rights guaranteed by § 7 and a violation of § 8 (1) of the Act" (*id.*, at 684). The Board's finding of an unfair labor practice "in [the employer's] direct negotiations with its employees when they had not revoked their designation of the union," was sustained "quite apart" from the Board's additional finding "that it was likewise an unfair labor practice for petitioner, in response to the offer of its employees, to induce them by the grant of wage increases, to leave the union" (*id.*, at 685).[10]

[10] *Peter J. Schweitzer, Inc.* v. *National Labor Relations Board*, 144 F. 2d 520 (App. D. C.), with which petitioner claims a conflict (Pet. 11, Br. 27, 30), is clearly distinguishable. In that case the employer granted a wage increase at a time when the employees had not selected any labor organi-

Petitioner here was not faced with the dilemma of excluding the employees in the unit from its application and risking unfair labor practice charges, or withholding its application altogether and denying wage increases to all of its employees. It could have bargained with the Union as it had with the electricians and other craft groups (*supra*, p. 9), and as the statute requires, or filed a joint application for a wage increase with the Union.[11] Petitioner chose in-

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zation to represent them in collective bargaining. While questions of the employer's motive in granting an increase, or even, conceivably, the conditional character of an increase, might be relevant in determining in such circumstances whether an increase was offered to induce employees to refrain from selecting an exclusive bargaining representative, those questions are irrelevant where the unilateral increase is granted after an exclusive bargaining representative has been selected.

[11] In its regulations entitled, "Jurisdiction and Procedure of Regional War Labor Boards," the National War Labor Board makes provision (Section VI, B, 2) for joint application for wage adjustments arrived at through collective bargaining. Section VI, B, 3, of the regulations covers the instant situation (where an employer applies on his own initiative for a wage adjustment) and clearly recognizes the interest of the collective bargaining representative in such application. Thus, this section provides that such application: " * * * shall be signed either (i) jointly by the employer and a duly recognized collective bargaining agent for any or all of the employees who are to be affected by the proposed wage or salary adjustment, or (ii) by the employer alone. In either case the application shall state whether or not there is a duly recognized collective bargaining agent (for any or all of the affected employees) which has not joined with the employer in the application. If it appears that there is such an organization which has not so joined,

stead to ignore its statutory duty. Indeed, as the Board found (R. 1, 60), the petitioner's action placed the Union in a genuine dilemma: the Union was compelled either to stand by and take the risk of losing is membership by acquiescing in wage increases concerning which petitioner had refused to bargain, or to request the War Labor Board not to consider petitioner's application for a wage increase insofar as it affected the bushelmen. To force an organization to such a step is almost to compel its self-destruction as an effective collective bargaining representative. Employer conduct which imposes such alternatives upon a statutory bargaining agent would seem to constitute a clear interference with employee self-organization. Cf. *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678, 686–687.

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the Wage and Hour Office at which the application was filed shall, before acting on the application, send the appropriate local officials of such organization a notice of the application, requesting the organization, if it has any objections to the application being acted upon, so to inform the office. If no such objections are filed within seven days of the sending of the notice, or if the organization in question states that it has no objections, the application will then be acted upon. * * * As used in this document, the term 'duly recognized collective bargaining agent' refers either to a labor organization which has actually been recognized by the employer for the purpose of collective bargaining or to a labor organization which has been certified by the National Labor Relations Board or a similar State agency where the legal result of such certification is that the employer is obligated to bargain with the union."

2. Petitioner also contends (Br. 17–25) that the provision of the order which restrains it from in any manner infringing the rights guaranteed to employees under Section 7 of the Act is invalid under the principles enunciated in *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426. But this argument is apparently based upon the erroneous assumption that the Board could not properly find that the petitioner's unilateral action with respect to the wage increase was a direct violation of Section 8 (1) of the Act (*supra*, pp. 11–14). The Court's refusal in the *Express Publishing* case to uphold a broad cease and desist order was predicated upon the fact that the unfair labor practice there was confined exclusively to a refusal to negotiate with the Union in good faith, a violation of Section 8 (5) of the Act. And while the Court recognized that a violation of Section 8 (5) also technically constituted a violation of Section 8 (1), it distinguished such a violation from the case where the Board found unfair practices which constituted separate and independent violations of Section 8 (1). The opinion makes it clear that the Board may enjoin violations of any section of the Act which it has properly found to have been directly infringed (312 U. S. 426, 434–435). Subsequent to its decision in that case this Court has enforced provisions identical with the one here involved. *National Labor Relations Board* v. *Automotive Main-*

tenance Machinery Co., 315 U. S. 282; *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685; and *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105. Contentions similar to that of the petitioner here were unsuccessfully presented to this Court in *Owens-Illinois Glass Co.* v. *National Labor Relations Board*, 123 F. (2d) 670 (C. C. A. 6), certiorari denied, 316 U. S. 662; *Wilson & Co.* v. *National Labor Relations Board*, 126 F. (2d) 114 (C. C. A. 7), certiorari denied, 316 U. S. 699; *National Labor Relations Board* v. *Algoma Net Co.*, 124 F. (2d) 730 (C. C. A. 7), certiorari denied, 316 U. S. 706; and *Butler Bros.* v. *National Labor Relations Board*, 134 F. (2d) 981 (C. C. A. 7), certiorari denied, 320 U. S. 789; *National Labor Relations Board* v. *Kaplan*, 138 F. (2d) 884 (C. C. A. 2), certiorari denied, 321 U. S. 788.

There is no conflict among the various circuit courts of appeals as to enforcing such provisions when, as in the instant case, the Board has found an independent violation of Section 8 (1) of the Act. In such cases, the provisions are consistently enforced. See cases collected in the Brief for the National Labor Relations Board in Opposition in *Max Kaplan Bros.* v. *National Labor Relations Board*, No. 690, October Term, 1943, pp. 10–11. In *Singer Mfg. Co.* v. *National Labor Relations Board*, 119 F. (2d) 131, 139–140 (C. C. A. 7), upon

which petitioner particularly relies (Br. 23–25), the Board regarded the employer's unilateral grant of a wage increase solely as evidence of his lack of good faith in bargaining with the Union and did not find that by this conduct the employer had directly violated Section 8 (1) of the Act (24 N. L. R. B. 444). That it was the absence of any such finding which impelled the court to modify the broad order in that case is evident from the subsequent decision of the same circuit court of appeals in *National Labor Relations Board* v. *Sunbeam Electric Mfg. Co.*, 133 F. (2d) 856, 862. The court there said:

> Although a specific violation may be one of the reasons for finding a more general violation, it does not follow that for every specific violation there may be an order covering all general violations. For instance, all failures to bargain are interferences, but all interferences are not failures to bargain. An employer, for failure to bargain, could not be ordered to cease and desist from all other imaginable interference, intimidation or coercion, in the absence of a finding that the failure to bargain was under the circumstances also a violation of Section 8 (1).
>
> In the case at bar, the employer was not found guilty of a specific offense which might be an element of a general, more comprehensive offense; it was found guilty of the general, more comprehensive offense,

> and the order may be as broad as the offense. If a refusal to bargain is interference, then to order one to cease and desist from that act stops the only kind of interference the employer was guilty of. But where the employer is found guilty of interfering, intimidating and coercing, it may be required not only to cease and desist from doing the number of things found, but also from all manner of like things.

Both the Circuit Courts of Appeals for the Ninth and Third Circuits, after their decisions in *National Labor Relations Board* v. *Mason Mfg. Co.*, 126 F. (2d) 810 (C. C. A. 9), and *National Labor Relations Board* v. *Newark Morning Ledger Co.*, 120 F. (2d) 262 (C. C. A. 3), with which petitioner asserts a conflict (Br. 22), have enforced Board orders of this type based on findings similar to those in the instant case.[12] *National Labor Relations Board* v. *Montgomery Ward & Co.*, 133 F. (2d) 676 (C. C. A. 9); *National Labor Relations Board* v. *Lebanon News Publishing Co.*, 129 F.

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[12] Both cases, moreover, are distinguishable from the instant case. In the *Newark Morning Ledger* case, like the *Singer* case, *supra*, the Board made no finding that petitioner had directly violated Section 8 (1), but found only a derivative violation of that section based on the violation of Section 8 (3). In the *Mason* case, the court believed that the employer's violation of the Act stemmed from "an honest confusion as to his obligations to his employees" and found therein no "general intent to violate the National Labor Relations Act" (126 F. (2d) 810, 814).

(2d) 325 (C. C. A. 3), enforcing 37 N. L. R. B. 649, 661.

3. Petitioner's attack upon the Board's unit finding (Br. 35–42) presents no question which warrants review by this Court. The courts have uniformly upheld the Board's use of the "extent of organization" principle. *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 132–135; *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. (2d) 876 (C. C. A. 3), certiorari denied, 319 U. S. 751; *National Labor Relations Board* v. *Lettie Lee, Inc.*, 140 F. (2d) 243 (C. C. A. 9).[13] The propriety of its application where, as here, the evidence shows (*supra*, pp. 4–6) that the employee group which has expressed a desire to be represented in a separate unit is functionally homogenous is scarcely open to question.

If the Board had dismissed the Union's petition for certification, a group of employees seeking to bargain collectively would have been denied the opportunity of utilizing the machinery of the Act for the solution of their problems until such indefinite time in the future as the employees of the

[13] National Labor Relations Board, *Third Annual Report* (1939), pp. 157–158; *Fourth Annual Report* (1940), pp. 83–84; *Sixth Annal Report* (1942), p. 63; *Matter of Swift & Co.*, 42 N. L. R. B. 1184; *Matter of Pacific Gas & Electric Co.*, 44 N. L. R. B. 665; *Matter of Gardner-Richardson Co.*, 52 N. L. R. B. 1260; *Matter of Richmond Greyhound Lines, Inc.*, 52 N. L. R. B. 1532.

entire store should become organized."[14] Petitioner offers no justification for so unjust a result. Surely an asserted inconvenience in bargaining with such a unit is no justification, for as was pointed out in *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. (2d) 876 (C. C. A. 3), certiorari denied, 319 U. S. 751, in sustaining the Board's unit determination based upon extent of organization, the employer in such a situation does "not consider it impractical to bargain with every single employee separately." Nor may the unit which application of this principle creates be challenged solely because an industrial store-wide unit might eventually be more desirable. A bargaining unit is not rendered invalid merely because further organization and maturity of bargaining relations might make a larger unit more appropriate. The fact that the Union in this case accepts membership and is now seeking to organize on a store-wide basis does not require the Board to deny a small presently or-

[14] Only a few months prior to the instant proceeding the Board in *Matter of May Department Stores*, 46 N. L. R. B. 305, dismissed a petition for investigation of representatives on the ground that no labor union organizing employees in the Famous-Barr store and involved in that proceeding had made a substantial showing of representation of employees in a store-wide unit. The propriety of a craft unit was, of course, not in issue and under such circumstances, the Board's determination that an industrial unit would be appropriate does not, of course, foreclose its findings that a craft unit is also appropriate.

ganized craft group access to the Act's election machinery, nor does the Board's present action foreclose it in the future from reshaping the bargaining unit upon a broader basis.[15] While in some situations the Board lends approval to store-wide units in department-store cases, it frequently holds a craft or related unit appropriate.[16] The diversity in the scope of bargaining units approved by the Board in this field reflects the fact that workers in department stores are just beginning to organize and bargaining patterns have not yet crystallized.

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[15] Petitioner's fears (Br. 36–37, 41–42) that the operations of its store may be disturbed by a long series of elections each conducted on a craft basis are wholly speculative. In applying the "extent of organization" principle the Board frequently points out, as it did here (R. 1, 13), that changes in the status of self-organization among the employees, foreseeable because of a union's broad organizational efforts, would require a subsequent enlargement of the unit. See, for example, the following cases: *Matter of Knaust Brothers*, 36 N. L. R. B. 915; *Matter of Eves and Andresen*, 42 N. L. R. B. 1209; *Matter of Foster-Grant Co.*, 32 N. L. R. B. 486; *Matter of Crescent Dress Co.*, 29 N. L. R. B. 351. Conversely, the previous unsuccessful attempts of a union to organize on a broader basis than the unit for which it petitions are not fatal to such a petition. *Matter of Standard Overall Co.*, 53 N. L. R. B. 960.

[16] See, for example, *Matter of May Department Stores*, 39 N. L. R. B. 471; *Matter of J. L. Brandeis & Sons*, 47 N. L. R. B. 614, enforced 142 F. (2d) 977 (C. C. A. 8) 1, certiorari denied October 16, 1944, No. 385, this Term; *Matter of J. L. Hudson Co.*, 49 N. L. R. B. 273; *Matter of Meier & Frank Co., Inc.*, 55 N. L. R. B. 101; *Matter of J. L. Hudson Co.*, 56 N. L. R. B., 406.

It is by no means clear that petitioner's insistence upon including in the unit employees in the women's alteration department and in the fur work room who were excluded by the Board is attributable to a desire to preserve for such employees "the full benefit of their right to self-organization and to collective bargaining" (Section 9 (b) of the Act).[17] And it is temerarious to suggest, as does petitioner, that no rational basis exists to support a simple craft unit of bushelmen—one of the oldest organized crafts in the United States.[18]

4. Petitioner's further challenge of the certification (Br. 31–35), on the ground that the Board considered the authorization cards submitted by the Union as sufficient evidence of the employees'

[17] *In Matter of J. L. Brandeis & Sons*, 47 N. L. R. B. 614, enforced, 142 F. (2d) 977 (C. C. A. 8), certiorari denied, October 16, 1944, No. 385, this Term upon which petitioner relies to show that the Board's exclusion of the two named groups of employees in this case was capricious (Br. 40), the Board held that such employees could appropriately be grouped together with bushelmen when the employees themselves had expressed a desire for such grouping. The case does not stand for the proposition that in the absence of such an expressed desire the groups may not appropriately be separated. And *Matter of May Department Stores*, 39 N. L. R. B. 471, upon which petitioner also relies (Br. 40–41), did not involve the question whether a unit of alteration workers would be appropriate if it failed to include those who work on women's clothing.

[18] See, Zaretz, C. E., *The Amalgamated Clothing Workers of America* (New York, 1924), pp. 54–68; Seidman, J., *The Needle Trades* (New York, 1941), pp. 70–84.

interest to warrant the Board in conducting an election, likewise presents no question warranting review by this Court. Petitioner's arguments in this connection were rejected by the court below after full consideration (R. 4, 10–11). The question is not of general importance in the administration of the Act, and no conflict of decisions is shown.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1945.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449; 29 U. S. C., Sec. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right

at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * *

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to

adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

U. S. GOVERNMENT PRINTING OFFICE: 1948

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CHARLES ELMORE CROPLEY
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No. 971

In the Supreme Court of the United States

OCTOBER TERM, 1944

MAY DEPARTMENT STORES COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

After the brief for the National Labor Relations Board in opposition in this case was filed, the opinions of the Circuit Court of Appeals for the Ninth Circuit in *National Labor Relations Board* v. *Cowell Portland Cement Company*, decided March 6, 1945, and *National Labor Relations Board* v. *Whiting-Mead Co.*, decided March 28, 1945, came to our attention. These decisions in part bear upon question numbered two in the instant case (see Brief for the National Labor Relations Board in Opposition, pp. 3, 15–19).

In both the *Cowell* and the *Whiting-Mead* cases, the court sustained the Board's findings that the company had interfered with, restrained and co-

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erced employees in the exercise of rights guaranteed in Section 7 and had thereby engaged in unfair labor practices in direct violation of Section 8 (1) of the National Labor Relations Act (for the Board findings in this respect, see 40 N. L. R. B. 652, 672–673, and 45 N. L. R. B. 987, 1000, 1001). In the *Cowell* case the court also sustained the Board's findings that the company had violated Section 8 (3) and (5) of the Act, and in the *Whiting-Mead* case, that the company had violated Section 8 (2), (3), and (5).

In the *Cowell* case, the court nevertheless eliminated that provision of the Board's order which, like the order sustained by the court below in the instant case, required the company to refrain in any manner from infringing the rights guaranteed to employees under Section 7 of the Act. In so holding the court stated:

> Paragraph 1 (f) requires respondent to cease and desist from "In any other manner interfering with, restraining or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid and protection, as guaranteed in Section 7 of the Act [29 U. S. C. A. § 157]." This, in effect, is a blanket order restraining respondent from

violating the statute [31] in any manner. We think such a blanket order unwarranted [32] and decline to enforce it.

[31] Sections 7 and 8 (1) of the Act, 29 U. S. C. A., §§ 157 and 158 (1).

[32] *National Labor Relations Board* v. *Express Pub. Co.*, 312 U. S. 426, 432–438; *National Labor Relations Board* v. *Walt Disney Productions*, 9 Cir., 146 F. 2d 44, 50.

In the *Whiting-Mead* case, however, the court issued a *per curiam* opinion directing enforcement of the broad 8 (1) provision of the Board's order. The opinion does not discuss the point even though it was briefed by both parties.

In the *Walt Disney* case (cited in the *Cowell* opinion), the court in its opinion had stated that it would refuse to enforce a broad 8 (1) order; however, the decree which was entered contained such a provision (Transcript of Record in *Walt Disney Productions* v. *National Labor Relations Board,* pending on petition for certiorari, No. 1021, this Term, p. 1393).[1] Moreover, the opinion in that case affords no precedent for the holding in the *Cowell* case because the court there reversed the Board's finding that the company had directly and independently violated Section 8 (1).

The inconsistency between the various decisions of the Circuit Court of Appeals for the Ninth

[1] We are informed, upon inquiry of the Clerk of the Circuit Court of Appeals for the Ninth Circuit, that the inclusion of the broad 8 (1) provision in the *Disney* decree was the result of inadvertence.

Circuit seems to arise from a difference in the viewpoint of the various members of that court. As early as *National Labor Relations Board* v. *National Motor Bearing Company,* 105 F. 2d 652, decided prior to this Court's decision in the *Express Publishing Company* case, the various judges of that court expressed differences of viewpoint respecting the enforcement of broad orders (see, for instance, the dissent of Judge Haney in that case, 105 F. 2d at 663–665).

The Board has filed a petition for rehearing in the *Cowell* case directed solely to the court's refusal to enforce the broad 8 (1) order.

While the decision of the Circuit Court of Appeals for the Ninth Circuit in the *Cowell* case in this respect is in conflict with that in the case at bar, the subsequent decision by the same court in the *Whiting-Mead* case would seem to remove the conflict. Moreover, we believe that the *Cowell* decision is erroneous under the principles established by this Court in the *Express Publishing* case. (The decision is also difficult to reconcile with the holding of the same court in *National Labor Relations Board* v. *Montgomery Ward & Company,* 133 F. 2d 676, cited in our brief in opposition, p. 18.) As presently advised, we do not believe the question has become sufficiently important to justify review at this time by the Court. For that reason, we remain of the opinion that the petition for a writ of certiorari in the

present case should be denied. If the Court should determine that certiorari should be granted in order to settle the matter, we respectfully urge that the writ be limited to the second question presented in our brief in opposition.

Petitioner's reply brief (p. 2) calls attention to the fact that the Board's main brief used the word "include" on pages 9–10 where the word should have been "exclude." Petitioner is correct in its statement, and we regret this typographical error.

CHARLES FAHY,
Solicitor General.

ALVIN J. ROCKWELL,
General Counsel,
National Labor Relations Board.

APRIL 1945.

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FILE COPY

OCT 8 1945

No. 39

In the Supreme Court of the United States

OCTOBER TERM, 1945

MAY DEPARTMENT STORES, DOING BUSINESS AS FAMOUS-BARR COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 39

MAY DEPARTMENT STORES, DOING BUSINESS AS FAMOUS-BARR COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 264–273) is reported in 146 F. 2d 66. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 45–56) are reported in 53 N. L. R. B. 1366. The decision and direction of election in a prior representation case, which forms part of the record in this case (R. 7–13), is reported in 50 N. L. R. B. 669.

JURISDICTION

The decree of the court below (R. 284–285) was entered on January 11, 1945. The petition for a writ of certiorari was filed on February 21, 1945, and granted on April 9, 1945 (R. 287, 288). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and on Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether it is an unfair labor practice, under Section 8 (1) of the National Labor Relations Act, for an employer, without notifying the certified exclusive bargaining representative of the employees in an appropriate unit or affording such representative an opportunity to negotiate, unilaterally to take action respecting wage increases for such employees and to inform the employees of such action.

2. Whether the cease and desist provisions of the Board's order, as sustained by the court below, are within the Board's authority.

3. Whether the Board could properly find that the employees in petitioner's busheling rooms constitute a unit appropriate for collective bargaining within the meaning of Section 9 (b) of the Act.

4. Whether, having decided that the holding of an election was warranted by the petitioning

union's showing that a substantial number of employees in the unit had authorized its affiliate to represent them for purposes of collective bargaining, the Board could properly certify, as exclusive bargaining representative of employees in an appropriate unit, a labor organization which received a majority of the votes cast in a Board-conducted election.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in Appendix A, *infra*, pp. ~~74-78.~~ 75-79.

STATEMENT

Pursuant to a petition filed by St. Louis Joint Council, United Retail, Wholesale and Department Store Employees of America, affiliated with the Congress of Industrial Organizations, herein called "the Union" (R. 3–4), the Board conducted a hearing and, on June 16, 1943, issued its Decision and Direction of Election in which it found that all of petitioner's employees "working in the busheling room, second floor, Department 280, and in the busheling room, basement, Department 281, including regular extra employees, but excluding the two foremen and all other employees of the Company, constitute a unit appropriate for the

purposes of collective bargaining" (R. 12).[1] The evidence in support of this finding (R. 9–11) may be summarized as follows:

Petitioner owns a retail department store in St. Louis, Missouri. In departments 280 and 281 of its store, which are variously called busheling rooms, alteration rooms, or tailor shops (R. 72), alterations and repairs are made on men's and boys' suits, overcoats, trousers, and sportswear sold to customers (R. 69, 72). In Department 280, located on the second floor balcony in a segregated space (R. 69–71), approximately

[1] These employees are bushelmen. In the retail trade, a bushelman is a general tailor "who makes alterations on men's ready-to-wear garments, by hand and machine sewing" and "may also fit and mark garments." *Dictionary of Occupational Titles, Part I, Definitions of Titles*, United States Department of Labor, United States Employment Service (Washington, 1939), pp. 118, 921; *Job Descriptions for the Retail Trade*, United States Department of Labor, United States Employment Service (Washington, 1938), p. 287. In the retail trade, persons who make alterations on women's ready-to-wear garments are classified in a number of ways but are not bushelmen. *Dictionary of Occupational Titles, loc. cit. supra; Job Descriptions for the Retail Trade, op. cit. supra*, at 299. In the garment manufacturing industry, on the other hand, a bushelman "repairs and alters shape of men's and women's garments that have been rejected as defective, performing all cutting of stitches, trimming of parts, rearrangement of padding, and hand or machine sewing that may be required." *Job Descriptions for the Garment Manufacturing Industry*, United States Department of Labor, United States Employment Service (Washington, 1941), p. 141; *Dictionary of Occupational Titles, loc. cit. supra.*

twenty-seven busheling employees are regularly employed to mend and alter clothes sold to customers on the second floor (R. 215–216, 68–69). In Department 281, located in the basement, three regular employees (R. 216, 108) are engaged in mending and altering clothing sold in the basement (R. 72, 111–112); additional employees worked in Department 281 during certain sales (R. 11, 108). Such employees have special hours of work which differ in starting time and length of lunch period from those of the salespeople, clerks, wrappers, and cashiers (R. 71–72). Bushelmen are classified according to their functions, as fitters, markers, tailors, or tailoresses, finishers, pressers, operators, examiners, and rippers (R. 223–225, 109). Except for the fitters, who mark the clothes for alteration on the customers, the bushelmen apparently have no contact with petitioner's customers or sales employees (R. 68–71, 115, 118–119, 120–122, 216). Busheling is regarded as skilled work and as a trade (R. 223–224, 112–113, 116, 127–128).[2]

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[2] Stowell, C. J., *The Journeymen Tailors' Union of America—A Study in Trade Union Policy* (1918), p. 135; *Job Descriptions for the Garment Manufacturing Industry*, United States Employment Service (Washington, 1938), p. ment Service (Washington, 1941), p. 141; *Job Descriptions for the Retail Trade*, United States Department of Labor, United States Employment Service (Washington, 1938), p. 287; Stowell, C. J., *Studies in Trade Unionism in the Custom Tailoring Trade*, Pub. by the Journeymen Tailors Union of America (Bloomington, 1913), pp. 24–25.

For about ten years, between 1910 and 1920, the bushelmen of all department and retail clothing stores in St. Louis, including petitioner's store, were organized and were represented by a local of the Journeymen Tailors Union (R. 218–223, 227, 232, 105, 139–140) which had a contract with an employers' association of which petitioner was a member (R. 221–223, 227, 139–140). While the bushelmen were not represented by any union between 1920 and 1942 (R. 208),[3] the petitioner has, for more than twenty years, been bargaining and contracting with numerous craft unions representing teamsters, electricians, carpenters, painters, and upholsterers (R. 240–241; 245–246).[4] The organization of bushelmen on a craft basis is common in the clothing industry (R. 220–225).[5] The bushelmen were fully organized and had ex-

[3] There was evidence that the bushelmen had collectively requested and received raises in pay in 1941 and 1942, while they were not represented by any union (R. 208–210, 214–215, 79–80). As a result of their requests, about 75 percent of them received a raise in 1941 and all received a raise in 1942 (R. 79–80, 143–145, 149).

[4] Petitioner also contracted with carpet layers, shoe repair workers, and picture frame workers, though for what period of time does not appear (R. 252).

[5] Hardman, J. B. S. (ed.), *The Amalgamated Today and Tomorrow* (New York, 1939), pp. 89–90; *Report of the General Executive Board and Proceedings of the Thirteenth Biennial Convention of the Amalgamated Clothing Workers of America; Documentary History, ACWA: 1938–1940* (New York), pp. 93–94, 98–99; Stowell, C. J., *The Journeymen Tailors' Union of America—A Study in Trade Union Policy* (1918), pp. 82–128.

pressed a desire to be represented in a separate unit (R. 72–73, 80–83). No labor organization claimed to represent petitioner's employees on a more comprehensive scale (R. 6, 11, 81).

On the basis of the foregoing facts, the Board rejected petitioner's contention that only a store-wide unit would be appropriate and, applying its "extent of organization" theory,[8] concluded that "collective bargaining should be made an immediate possibility for the employees in the busheling rooms without requiring them to await the uncertain date when the employees may be organized in a larger unit" (R. 11).

The Board also rejected petitioner's contention that a unit of employees in the men's busheling rooms would be inappropriate unless it included the employees in the women's alteration department and in the fur work room (R. 11, 146). It

[8] The Board believes that the purposes and policies of the Act are usually effectuated by permitting immediate access to the Act's machinery to small, fully organized groups of employees with mutual interests in the subject matter of collective bargaining. See National Labor Relations Board, *Second Annual Report* (1937), pp. 123–124; *Third Annual Report* (1939), pp. 157–158, 160, 163; *Fourth Annual Report* (1940), pp. 83–84; *Sixth Annual Report* (1942), p. 63; *Seventh Annual Report* (1943), pp. 59–60; *Eighth Annual Report* (1944), p. 53; *Ninth Annual Report* (1944), p. 33; *Matter of R. C. A. Communications, Inc.*, 2 N. L. R. B. 1109, 1115; *Matter of Gulf Oil Corp.*, 4 N. L. R. B. 133, 137; *Matter of Stockholders Publishing Company, Inc.*, 28 N. L. R. B. 1006, 1025–1026; *N. L. R. B.* v. *Hearst Publications*, 322 U. S. 111, 132–135.

pointed out (R. 11) that "there is historically a sharp demarcation between the trades involved" (R. 102–103, 219–226, 231, 243, 261–262); "traditionally, such workers have been represented by separate craft unions" (R. 102–103, 224–226, 231, 243); the women's clothing alteration workers are located in a different part of the store from the men's (R. 68–70, 125); and there is no substantial interchange of employees from one to the other (R. 74–77, 150, 153).[7]

It is the Board's usual practice to proceed with an investigation of a question concerning representation only where a substantial number of the employees in the appropriate unit have shown an interest in being represented by the labor organization involved,[8] and there was introduced at the hearing a report of the Board's regional director (R. 155–156) which recited that the Union had submitted authorization cards signed by a large number of employees in the unit.[9] On the basis

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[7] Such few transfers as did occur were either permanent (R. 150) or were intended to reduce the size of the busheling force (R. 443).

[8] See National Labor Relations Board, *Eighth Annual Report* (1944), p. 44; *Sixth Annual Report* (1942), p. 55.

[9] The authorizations ran to the United Department Store Employees Union, affiliated with the United Retail, Wholesale and Department Store Employees of America, C. I. O. (R. 155–156), the former being one of the locals affiliated with the Union (R. 106). As the Board found (R. 8), the Union represents its local affiliates in collective bargaining, and the employees were cognizant of this (R. 90, 213).

of this report, the Board concluded that the holding of an election was warranted (R. 9), and directed that an election be conducted to determine whether the employees in the unit desired to be represented by the Union, or by the American Federation of Labor,[10] or by neither (R. 12–13). The Board directed that the name of the American Federation of Labor appear on the ballot despite the fact that that organization presented no evidence that it had been authorized to represent any employees in the unit involved (R. 9, 12–13). The A. F. of L. was subsequently permitted to withdraw, and its name did not appear on the ballot (R. 23). The election was held on June 29, 1943, and thirty-six votes were cast for the Union and one against it (R. 24–25). The Board accordingly certified the Union as the exclusive bargaining representative of all the employees in the unit (R. 25–26).

Thereafter, on December 17, 1943, upon the usual proceedings, the Board issued its decision and order finding that, after the certification, petitioner had refused to bargain with the Union in violation of Section 8 (5) of the Act and that by such refusal and by other conduct petitioner had violated Section 8 (1) of the Act (R. 45–56). The evidence in support of these findings may be summarized as follows:

[10] The American Federation of Labor and its affiliated international unions had moved to intervene in the representation proceeding (R. 5–6).

On July 8, 1943, the Union requested petitioner to bargain concerning wages, hours, and working conditions for the employees in the appropriate unit (R. 193). Petitioner, on July 19, 1943, rejected this request, asserting that the unit was not appropriate for collective bargaining (R. 194).

Subsequently, without consulting the Union, petitioner decided to increase by $2 per week the salaries of substantially all its employees, including those represented by the Union as exclusive bargaining agent. On August 31, 1943, still without notifying the Union, petitioner applied to the National War Labor Board for approval of its plan to grant this increase and to make the increase retroactive to August 2, 1943 (R. 194–198). A form submitted with the application required the applicant to list the groups of employees whose wages had been negotiated or were then the subject of negotiation with labor organizations and the names of such organizations (196 A). Petitioner listed electricians, carpenters, painters, and plasterers, and their collective bargaining representatives, but not the bushelmen and the Union (R. 197). In a letter accompanying the application,[11] petitioner stated (R. 195; see also R. 197–198):

> The application which covers the employees at the store shows that we have Union contracts and working agreements which

[11] Two applications were submitted covering different groups of employees (R. 194–195).

cover certain craftsmen, including electricians, painters, carpenters, and plasterers. These employees, being covered by collective bargaining agreements, are excluded from this application.

Petitioner further stated that the Union represented the employees in the busheling rooms and had been certified by the Board, but that the applicant viewed the unit as inappropriate and intended to disregard the Board's certification to test its position in the court. It stated that it had neither recognized nor bargained with the Union and intended to include the busheling employees in its application. Finally, it stated that it did not believe that the Union had "any interest whatever in the enclosed application" but that, in the event that the Union should [redacted] object to the inclusion of the busheling employees, the application should be considered amended so as to exclude them (R. 195).

Thereafter, on September 1, 1943, petitioner's superintendent of employment announced to the employees the filing of this unilateral application over a public address system in the store (R. 187–188, 204–206), and a further announcement to the same effect appeared in petitioner's store newspaper on September 3, 1943 (R. 206A). In both announcements, petitioner stressed the voluntary nature of the proposed increase and the fact that if it was approved, the accumulated amount of the increase would be paid in a lump sum (R. 204–

206A). On the same day, September 3, the Union filed a charge that petitioner had refused to bargain on July 19, 1943, and had thereafter taken the unilateral action described above (R. 26–27). On September 11, 1943, petitioner's vice president made a speech to the employees over its public address syster. in which he stated that he had no news as to the status of the application, and without explaining what prompted him to speak to the employees said: "* * * we did not expect to talk to you again on the subject [of the application for a wage increase] as soon as this, and still less did we think it would be necessary to make such a statement as we now have to make. * * * We have filed these applications in good faith and will do everything we can to secure their approval as soon as possible. We sincerely hope that nothing will occur which will delay or obstruct or prevent this approval" (R. 189–190).

Adopting, without restatement, the findings and conclusions of the trial examiner who conducted the hearing (R. 45), the Board found (R. 51) that petitioner, on July 19, 1943, and thereafter, had refused to bargain collectively with the Union in violation of Section 8 (5). The Board further found (R. 52) that petitioner's action "in ignoring the Union while attempting to win approval of its proposal for wage increases, and in publishing the facts of its unilateral action to its employees, including employees represented by the Union, had the effect of depriving the Union

of credit which normally would accrue to it, and of nullifying its efficacy as a bargaining agent. The said action may, therefore, reasonably be said to have undermined the Union among employees for whom it had been certified as bargaining representative, and to have discouraged employees generally in their union affiliation." The Board concluded that "by its unilateral action in seeking approval of its proposed wage adjustments, and by statements of its officers and its publication Store Chat addressed to employees concerning said unilateral action, the [petitioner] interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act," in violation of Section 8 (1) (R. 53, 54). It ordered petitioner to: 1. Cease and desist from: (a) refusing to bargain with the Union; (b) "in any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act." 2. Take the following affirmative action: (a) upon request, bargain collectively with the Union; (b) post notices; (c) notify the regional director for the fourteenth region what steps it has taken to comply with the Board's order (R. 45–46).

On March 14, 1944, the Board filed a petition in the court below to enforce the Board's order (R. 57–59). On December 20, 1944, the court announced its opinion (R. 264–273) in which it decided that the Board's order should be enforced. Thereafter, petitioner filed a petition for rehearing (R. 273–283). On January 11, 1945, the court entered its order modifying the Board's order by limiting paragraph 1 (b) thereof so that the petitioner is required to cease and desist from interference with the rights of only the employees in the busheling rooms, and denying the petition for rehearing [12] (R. 283–284). On the same day, the court entered its decree enforcing the Board's order as modified (R. 284–285).

SUMMARY OF ARGUMENT

I

The Board's conclusion that the petitioner violated Section 8 (1) of the National Labor Relations Act by taking unilateral action affecting the wages of employees without previously notifying or consulting their exclusive bargaining agent and by calling this action to the attention of the employees is supported by the uniform holdings of this Court and the circuit courts of appeals. The principle that an employer may not alter existing terms of employment without previously notify-

[12] While the Board believes that the court's modification of paragraph 1 (b) is improper, it has not sought review of that modification.

ing the exclusive representative and affording it an opportunity to negotiate concerning the proposed change was embedded in the philosophy of collective bargaining at the time the Act was adopted and is regarded as axiomatic by experts in labor relations. Under the Act, just as individual bargaining is outlawed as the antithesis of collective bargaining, so unilateral alteration of conditions of employment is outlawed as the antithesis of bargaining itself. Such unilateral action by an employer frustrates the desire of workers for a voice in the making of decisions which affect their daily lives and strikes at the fundamental motive for self-organization. In the instant case petitioner's conduct, because of the circumstances of the war emergency, practically removed rates of pay from the field of bargaining open to the Union and destroyed *pro tanto* the value of union membership in the eyes of the employees. Moreover, by implying in its announcement regarding the projected wage increase that the Union could vindicate its position as bargaining agent only at the employee's expense, petitioner, as the Board found, created an apparent conflict of interest between the employees and their representative, thus further discouraging union membership and affiliation.

II

Having found that petitioner had violated Section 8 (1) of the Act, not only by its refusal to

bargain, but by its unilateral request for a wage increase and statements to its employees with respect to such unilateral act, the Board properly ordered petitioner to cease and desist from violating Section 8 (1). The National Labor Relations Act expressly authorizes the Board to enjoin "such unfair labor practice" as it has found to have been committed, and it is clear that the reference is to each of the five unfair practices outlined in Section 8. Consequently, the circuit courts of appeals have generally construed the Act as evidencing a Congressional intent that Board orders be framed to prohibit all unfair labor practices of the type or class committed, and not merely the repetition of the precise form of acts previously committed or the commission of substantially identical acts. If the Act were more narrowly construed, its enforcement would bog down in procedural delays which would, as a practical matter, operate as a rejection of the Congressional judgment that one violation of the Act was likely to lead to others.

The order here entered is consistent with the uniform administrative practice under the Act, and with the decision of this Court in *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426. In that case, this Court pointed out that a refusal to bargain alone might warrant the type of order here entered if the Board made a "finding based either on the specific circum-

stances disclosed by the record or on its own "expert judgment" of the relation between the acts found to have been committed and the policy embodied in Section 7. Here, there was not merely a refusal to bargain but a direct and substantial infringement of the rights granted by Section 7, and the Board's findings reveal the close relationship between the acts committed and all the rights enumerated in Section 7 and protected from infringement by Section 8 (1).

A consideration of the conceivable alternative orders compels the conclusion that the order, as it stands, is neither too broad nor defective in any other way, but is an appropriate exercise of the Board's power. The rights protected by the Act are specific and relatively narrow. While there are many methods of interference with those rights, the rights themselves are, on the whole, simple and readily understood, and generally no ingenuity is required to refrain from such interference.

III

Designation of the appropriate unit is a matter for determination in each individual case, and, in investing the Board with this function, Congress did not restrict it to the use of inflexible rules. The power committed to the Board is a broad power of discretion, the exercise of which is final unless clearly arbitrary or capricious. The Board's determination that the employees in pe-

titioner's busheling rooms constitute an appropriate bargaining unit was a proper exercise of the Board's discretion.

In grouping the bushelmen separately for bargaining purposes, the Board took into consideration the fact that they are a readily identifiable, homogeneous group of workers, engaged in a traditional skilled craft. The Board also based its unit determination upon the fact that the bushelmen were fully organized and had expressed a desire to be represented in a separate unit, and that no labor organization claimed to represent petitioner's employees on a more comprehensive scale. Where other factors are favorable, the Board, as in the instant case, permits immediate access to the Act's machinery to small, fully organized groups of employees with mutual interests in the subject matter of collective bargaining. A small, presently organized craft group, it is thought, should not be denied representation solely because an industrial store-wide unit might eventually be more desirable. This "extent of organization" principle has been approved by this Court. *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111, 132–135.

The Board also properly rejected petitioner's contention that the employees in the women's alteration department and the fur work room must be included in the unit. The Board took note of the facts that, traditionally, where alteration departments have been organized on a craft basis,

the women's and men's alteration workers have been represented by separate craft unions and, in the instant case, that there was no fluidity of interchange of personnel requiring a broader unit in order to make collective bargaining effective.

IV

Since the Union received a majority of the votes cast in a Board-conducted election to determine the exclusive bargaining representative of petitioner's employees in an appropriate unit, it was properly certified by the Board. The validity of the Board's certification is in no way impaired by the fact that the authorization cards, upon the basis of which the Board determined that an interest in representation existed and that an election should therefore be held, ran to one of the locals affiliated with the Union, rather than to the Union. The Board found that the Union represents its local affiliates in collective bargaining and was, therefore, eligible to file a petition for investigation and certification of representatives.

The showing of interest in representation which the Board requires of the party filing such a petition is merely a self-imposed administrative requirement to advise the Board, as a preliminary matter, that there is sufficient justification for proceeding with the investigation of representatives. But even if the Board is required to de-

termine the petitioning union's interest in representation, that requirement was met here. In any event, the Board's decision to put the Union on the ballot did not prejudice petitioner; only an employee would have standing to raise such an objection.

ARGUMENT

I

THE BOARD PROPERLY FOUND THAT PETITIONER VIOLATED SECTION 8 (1) OF THE ACT

Section 7 of the National Labor Relations Act guarantees to employees "the right to self-organization, * * * to bargain collectively through representatives of their own choosing." Section 9 (a) provides that "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *." Section 8 (1) of the Act forbids interference by employers with the rights guaranteed to employees in Section 7.

The obligations thus imposed upon employers encompass not alone "the negative duty to treat with no other" than the statutory representative with respect to proposed changes in rates of pay,

hours of employment, or other conditions of employment (*National Labor Relations Board* v. *Jones & Laughlin Corp.*, 301 U. S. 1, 44), a duty which precludes bargaining with individuals, groups, or other representatives (*Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678; cf. *J. I. Case Company* v. *National Labor Relations Board*, 321 U. S. 332), but also the affirmative duty to notify and bargain in good faith with the exclusive representative before putting any such changes into effect. (Cf. Section 8 (5)). The existence of this affirmative duty was recognized in *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678, 684. There, as here, after a collective bargaining representative had been selected, the employer granted a wage increase without notifying or consulting the Union. The Court held that the employer, "by ignoring the union as the employees' exclusive bargaining representative" when making a change in wage rates, had violated Section 8 (1) of the Act. The Court's finding of violation in this aspect of the employer's conduct was independent of its additional findings that the employer had failed to observe its negative duty "by negotiating with its employees concerning wages at a time when wage negotiations with the union were pending," and had, "quite apart" therefrom, further violated the Act "by inducing its employees to abandon the union by promising them higher wages" (*ibid.*). Petitioner's conten-

tion that the *Medo Photo* case "is distinguished from the case at bar in that there were in that case direct negotiations between the employer and the employees" is therefore clearly erroneous, as is its contention that the case is not controlling because here, unlike the *Medo* case, "the salary increase was not conditioned in any way" (Br. 34). Questions of the employer's motive in raising or lowering wages, moreover, are relevant only in determining whether or not the change was made to induce employees to refrain from joining or to repudiate a collective bargaining representative, and was consequently an unfair labor practice; they are irrelevant where, as here, the Board's finding turns not on the motive for the particular change in terms of employment but solely upon the unilateral nature of its effectuation.[13]

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[13] The Board emphasized this distinction in *Matter of Oughton*, 20 N. L. R. B. 301, 318, enforced, 118 F. 2d 486, 494, 498 (C. C. A. 3), certiorari denied, 315 U. S. 797, where the employers contended, as petitioner does here (Br. 36–39), that their unilateral action should not be found an unfair labor practice because the substantive change in terms of employment was not motivated by anti-union considerations. The Board said: "We do not here pass upon any question as to the business necessities which may have prompted the respondents to effect the wage reduction and the increase in hours of labor. It is the respondents' failure to give prior notice or to consult with the Union regarding these matters and not the wage reduction and increase in hours, themselves, which we have scrutinized." See also, *Matter of Whittier Mills Co.*, 15 N. L. R. B. 457, 466, enforced, 111 F. 2d 474 (C. C. A. 5). On the other hand, *Peter J. Schweitzer, Inc.*

The employer's affirmative duty under Section 8 (1) is correlative with, and springs from, "the right of the representatives of the unit to be consulted and to bargain" about all matters affecting terms and conditions of employment, including "the exceptional as well as the routine rates, rules and working conditions." *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U. S. 342, 347. Recognizing, as does this Court, that the right is embedded in Section 7 of the Act, the Board and the circuit courts of appeals have uniformly held that once an exclusive bargaining representative has been selected, the employer may not alter existing terms of employment without previously notifying the exclusive representative and affording it an opportunity to negotiate concerning the proposed change.[14]

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v. *National Labor Relations Board*, 144 F. 2d 520 (App. D. C.), upon which petitioner relies, involved no question of an employer's obligations to an exclusive bargaining representative. In that case, no exclusive bargaining representative had been selected, and the case turned solely on the question whether the Board could properly find that a wage increase granted prior to a Board election was an unfair labor practice where the increase was not conditioned upon rejection of the Union in the election but was, as the Board found, offered to induce employees to vote against the Union.

[14] *Matter of Louisville Refining Co.*, 4 N. L. R. B. 844, 859–860; enforced, 102 F. 2d 678 (C. C. A. 6), certiorari denied, 308 U. S. 568; *Matter of Chicago Apparatus Co.*, 12 N. L. R. B. 1002, 1008–1012, enforced, 116 F. 2d 753, 756–759 (C. C. A. 7); *Matter of Whittier Mills Co.*, 15 N. L. R. B. 457, 465–466, enforced, 111 F. 2d 474, 478–479 (C. C. A. 5); *Matter of George P. Pilling & Son Co.*, 16 N. L. R. B. 650, 655–659, en-

These holdings comport with familiar principles of trade unionism under which it is axiomatic

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forced, 119 F. 2d 32, 36, 38 (C. C. A. 3); *Matter of Wilson & Co.*, 19 N. L. R. B. 990, 999–1000, enforced, 115 F. 2d 759, 763 (C. C. A. 8); *Matter of Oughton*, 20 N. L. R. B. 301, 318, enforced, 118 F. 2d 486, 494, 498 (C. C. A. 3), certiorari denied, 315 U. S. 797; *Matter of Inland Lime & Stone Co.*, 24 N. L. R. B. 758, 769–770, enforced, 119 F. 2d 20, 22 (C. C. A. 7); *Matter of Schmidt Baking Co.*, 27 N. L. R. B. 864, 868–870, enforced, 122 F. 2d 162 (C. C. A. 4); *Matter of Aluminum Ore Co.*, 39 N. L. R. B. 1286, 1295–1299, enforced, 131 F. 2d 485, 487 (C. C. A. 7); *Matter of Great Southern Trucking Co.*, 34 N. L. R. B. 1068, 1085, enforced, 127 F. 2d 180, 186 (C. C. A. 4), certiorari denied, 317 U. S. 652; *Matter of Barrett Co.*, 41 N. L. R. B. 1327, enforced, 135 F. 2d 959, 961 (C. C. A. 7); *Matter of Crown Can Co.*, 42 N. L. R. B. 1160, enforced, 138 F. 2d 263, 267 (C. C. A. 8), certiorari denied, 321 U. S. 769; *Matter of Consolidated Aircraft Corp.*, 47 N. L. R. B. 694, enforced, 141 F. 2d 785, 787 (C. C. A. 9); *Matter of South Carolina Granite Co.*, 58 N. L. R. B. 1448, 1462–1464 (unilateral employer application to War Labor Board for wage increase).

This is true even where the union has not yet approached the employer for collective bargaining conferences. *Matter of General Motors Corp.*, 59 N. L. R. B. 1143, enforced, 150 F. 2d 201 (C. C. A. 3); *Matter of Riverside Mfg. Co.*, 20 N. L. R. B. 394, 400–407, enforced, 119 F. 2d 302 (C. C. A. 5).

The New York State Labor Relations Board and the New York courts have similarly construed the obligation to bargain collectively under the New York Act as prohibiting unilateral changes of terms or conditions of employment after an exclusive bargaining representative has been selected. *New York State Labor Relations Board* v. *Montgomery Ward & Co., Inc.*, 179 Misc. 298, aff'd, 266 App. Div. 878, enforcing, 5 N. Y. S. L. R. B. 441, 448; *Matter of Union Club*, 6 N. Y. S. L. R. B. 137, 146–147; *Matter of Fraioli Flour Trucking Co.*, 6 N. Y. S. L. R. B. 539, 540; *Matter of Davy Jones Sea Food House, Inc.*, 5 N. Y. S. L. R. B. 1026, 1028.

that "collective bargaining requires negotiations prior to action by either party * * * any unilateral action is barred."[15] Just as the term "collective bargaining", as understood at the time Congress adopted it, implied a system requiring the reduction of agreements to writ-

[15] Chamberlain, Neil, *The Nature and Scope of Collective Bargaining*, Quarterly Journal of Economics, Vol. 58, No. 3 (May 1944), pp. 359, 375–376, 378. In the course of this discussion, at pp. 377–378, the author says: "Since the element of mutuality requires that each party negotiate with the other before taking any action in any field of joint concern [i. e., a subject matter appropriate for collective bargaining], it follows that direction of the collective bargaining process to particular issues does not rest solely with the union. Rather, the party wishing to alter the terms of relationship is the one obliged to notify the other of its wishes and to propose negotiations. The burden of initiating discussions on particular issues may thus rest with the employer, and this not only in those instances when he is seeking to curtail the union's prerogatives or its members' perquisites but also when he proposes to extend them. Once joint concern is established, any unilateral action is barred." [Explanatory matter in brackets added.] Professor Slichter succinctly states the principle in the form of advice to employers: "Don't 'short circuit' the union; if you recognize it, deal with it and through it. Make no announcements of labor policies without consulting it." Slichter, Sumner, H., *The Contents of Collective Agreements*, Society for the Advancement of Management Journal, Vol. 3, No. 1 (January, 1938), pp. 13, 19.

Dr. Leiserson, in 1920, analogized the obligations imposed upon employers and employees under the principles of collective bargaining to those of a partnership relation. "Partnership between labor and capital is coming to mean that the management or the owner of the business must look upon labor as the equal of the management. When

ing (*H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 524), so also did the term comprehend the principle that the representative must be consulted and afforded an opportunity to bargain before the employer effected any changes in the working conditions of employees in the unit.[16] From its very inception,

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we have such a partnership, two equal partners, then one partner cannot do anything without consulting the other partner. That is partnership. Moreover, these industrial representation plans, however imperfect they may be now, all tend to make labor and capital equal and partners in the business." Leiserson, William M., *The Meaning of Labor Representation*, Annals of the American Academy of Political and Social Science, Vol. 90 (July, 1920) p. 23. Two months later he expanded this theme. "Collective bargaining," he pointed out, "implies a questioning of the absolute authority of the management in governing the productive efforts of the employees.' It says there must be no rules or orders affecting the interests and welfare of the wage earners without the consent of those who must obey them." Leiserson, William M., *Collective Bargaining and Its Effect on Production*, Annals of the American Academy of Political and Social Science, Vol. 91 (September, 1920), p. 42. See also Daugherty, Carroll R., *Labor Problems in American Industry* (New York, 1941), p. 273.

[16] During the period prior to the passage of the Act when employees achieved collective bargaining, not as a right accorded by law, but as a result of their economic strength, they often insisted upon incorporating into collective agreements provisions expressly requiring joint consultation between union and management representatives as a condition precedent to the institution of any changes in the terms or conditions of employment. U. S. Bureau of Labor Statistics, Bull. No. 393, *Trade Agreements 1923 and 1924*, pp. 48, 50, 59, 60, 87; Bull. No. 419, *Trade Agreements 1925*, pp. 74, 83, 102, 104, 120; Bull. No. 448, *Trade*

trade unionism has regarded this principle as the essence of collective bargaining.[17] In the Railway Labor Act of 1926, as well as in the 1934 Act, Congress explicitly adopted this principle of collective bargaining which precludes the employer from changing rates of pay, rules or working conditions

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Agreements 1926, pp. 76, 95, Haber, W. G., *Workers' Rights and the Introduction of Machinery in the Men's Clothing Industry*, Journal of Political Economy, Vol. 33 (August, 1925), pp. 388, 404–405. Provisos of this type in effect reiterating the mutuality already implicit in the agreement, enabled the workers "to maintain their old standards of work and pay for all members of the group * * *" by prohibiting "changes except when a new collective bargain is made * * *". Hoxie, Robert F., *Trade Unionism In The United States* (New York, 1923), p. 290. See also Daugherty, Carroll R., *Labor Problems in American Industry* (Cambridge, 1936), p. 545; Mitchell, John, *Organized Labor* (Philadelphia, 1903), pp. 7–8.

[17] "* * * joint consideration and determination of the terms of employment are the essence of industrial democracy. Although the earlier councils introduced by the employer were not always permitted to deal with such controversial matters as wages and hours, the majority of contemporary works councils enjoy this power. Ever since its inception, of course, trade unionism has functioned in this sphere." Watkins, Gordon S. and Dodd, Paul A., *The Management of Labor Relations* (New York, 1938), pp. 694–695; Webb, Sidney and Beatrice, *Industrial Democracy* (London, 1920), pp. 217–218; Alexander, Magnus W., *Collective Bargaining—Some Fundamental Considerations*, Annals of the American Academy of Political and Social Science, Vol. 90 (July, 1920), pp. 61, 67; Gompers, Samuel, *Collective Bargaining* (Washington, D. C., 1920), p. 1; Woll, Mathew, *Labor, Industry and Government* (New York, 1935), p. 112; Bowne, Waldo D., *What's What in the Labor Movement* (New York, 1921), p. 75; Catlin, Warren B., *The Labor Problem* (New York, 1935), p. 424, describes collec-

except after notice to, and negotiation with, the union representing the employees affected.[18] The War Labor Board has recognized that the concept of collective bargaining requires that employers notify the exclusive representative even of proposed technological changes and afford the union an opportunity to discuss and negotiate concerning the matter before instituting the proposed change.[19] Experts in labor relations espouse this concept of collecting bargaining. Thus, representatives of labor have said that policies affecting

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tive bargaining as a system in which "The interests and predilections of the workers come to be consulted in making alterations of policy or changes in methods. The government of the business becomes at least a constitutional monarchy and may approach 'industrial democracy.'" See also, Watkins & Dodd, *op. cit. supra*, pp. 666–667.

[18] Section 6, 45 U. S. C. 156. For the 1926 Act, see 44 Stat. 582; the 1934 Act, 48 Stat. 1197. See Judge Hutcheson's statement in *Brotherhood of Railway & Steamship Clerks* v. *Texas & N. O. R. Co.*, 25 F. 2d 873, at 875–876 (S. D. Texas), aff'd, 281 U. S. 548, to the effect that the "guarantee granted to [the employees] by Congress," was "that his wages and working conditions shall not be fixed for him without representation."

[19] *In re Riverside and Dan River Cotton Mills, Inc.* [*Danville, Va.*] and *Pittsylvania County Joint Board, Textile Workers Union of America (C. I. O.)* Case No. 2664–CS–D (June 29, 1944), 16 War Lab. Rep. 663. Cf. *In re Douglas Aircraft Co., Inc.* [*Tulsa, Okla.*] and *International Association of Machinists, Lodge 842 (AFL)*, Case No. 111–12530–D, 17 L. R. R. 40, 41, in which the War Labor Board denied the company's request that it be permitted to change shift hours without prior notice to, and consultation with, the Union whenever such changes were directed by agencies of the United States Government.

terms and conditions of employment should "be worked out jointly in union management negotiations; that is the primary function of a union, and to side-step it, in whole or in part, almost certainly leads to industrial strife. The day when management in granting improved working conditions could beat its chest in philanthropic gusto is past; these things, and partial credit for them now belong to the unions."[20] And the executive Secretary of the University of Chicago's Industrial Relations Center recently pointed out that when the practice and procedure of collective bargaining has been accepted by management—

> The company recognizes that the setting of wage rates, the establishment of criteria for layoffs and advancement, the setting of production standards, and other matters falling within the scope of so-called management prerogatives affect workers as human beings, and, as human beings, workers want to be consulted about these matters and seek some voice in their determination. Companies which have accepted unions are usually convinced that the participation of workers through their unions in the determination of policies which affect them tends to increase efficiency and to strengthen rather than weaken management. Avoiding taking unilateral action in such matters, the manage-

[20] Golden, Clinton S., and Ruttenberg, Harold J., *The Dynamics of Industrial Democracy* (New York, 1942), pp. 102–103.

> ment banks on its leadership "ability" rather than its prerogatives to initiate action. It frankly acknowledges the role of the union in bringing about improvements in working conditions.[21]

So in a statute which "generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States," *Order of Railroad Telegraphers* case, 321 U. S. at 346; see also *Heinz* case, 311 U. S. at 523–526, and just as individual bargaining is outlawed as the antithesis of collective bargaining (*supra*, pp. 20–21), unilateral settlement is necessarily outlawed as the antithesis of bargaining itself.[22] "The very

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[21] Harbison, Frederick H., *The Basis of Industrial Conflict*, Address, reprinted, 17 L. R. R. 34, 36 (Sept. 10, 1945).

[22] "The right of collective bargaining is wholly inconsistent with unilateral company action * * *." *Consolidated Aircraft Corp.* v. *National Labor Relations Board*, 141 F. 2d 785, 787 (C. C. A. 9). Wages "is a subject matter no longer to be unilaterally determined by the employer," *Singer Manufacturing Co.* v. *National Labor Relations Board*, 119 F. 2d 131, 137 (C. C. A. 7), certiorari denied, 313 U. S. 595. See also *National Labor Relations Board* v. *George P. Pilling & Son Co.*, 119 F. 2d 32, 38 (C. C. A. 8).

The practice of individual bargaining, with which collective bargaining is typically contrasted, is, in practice, tantamount to unilateral employer determination of terms and conditions of employment. As early as 1898, this Court noted the fact that in dealings between the industrial employer and the individual employee, "the proprietors lay down the rules and the laborers are practically constrained to obey them" *Holden* v. *Hardy*, 169 U. S. 366, 397. As Bishop Francis Haas, a member of the National Labor Board established under Section 7 of the N. I. R. A.,

purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group." *J. I. Case Co.* v. *National* Labor Relations Board, 321 U. S. 332, 338. Terms imposed unilaterally by the employer, even more clearly than terms arrived at through individual bargaining, fail to meet this statutory standard.

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testified before a Senate Committee considering the Wagner Bill: "Customarily, the wage relationship prior to June 16, 1933, was referred to as an individual bargain. In point of fact, among the overwhelming number of 48,000,000 workers in the United States there was no bargaining whatsoever. * * * The great mass of workers were, at the time they were hired, simply told what they would get. Very frequently, they were not even told. After employment, when piece rates were changed, the foreman simply announced the new rates. He could announce rates as low as he chose, limited only by the shortage of workers standing ready to take jobs. Briefly the typical employer-employee relationship did not have even the appearance of trading or bargaining. The employer simply notified the worker what wages he was to get and the hours he was to work." Hearings, S. Committee on Education and Labor, S. 2926, 73d Cong., 2d Sess., pt. 1, p. 116. Compare the statement of Senator Wagner, 73d Cong., 2d Sess., pt. 1, p. 17: "I think it has been recognized that, due to our industrial growth, it is simply absurd to say that an individual, one of 10,000 workers, is on an equality with his employer in bargaining for his wages. The worker, if he does not submit to the employer's terms, faces ruin for his family. The so-called freedom of contract does not exist under these circumstances." See also, Daugherty, Carroll R., *Labor Problems in American Industry* (Cambridge, 1936), p. 413.

Unilateral employer action in disregard of the exclusive bargaining representative, as the Board has noted many times, constitutes a direct attack upon the entire process of self-organization.[23] Since "one of the primary motives for union membership is the desire of workers to have a voice in making the decisions that vitally affect their everyday lives,"[24] employer action which

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[23] See *supra*, note 14, pp. 23–24.

[24] Golden, Clinton S., and Ruttenberg, Harold, Jr., *The Dynamics of Industrial Democracy* (New York, 1942), p. 82; see also, *American Federation of Labor Reconstruction Program*, reprinted in Commons, John R., *Trade Unionism and Labor Problems* (Boston, 1921), 562, 563; Daugherty, Carroll R., *Labor Problems in American Industry* (New York, 1941), pp. 272, 273, 275, 284. Experts in personnel management recognize the deep seated psychological basis for this desire. "In all human affairs nothing so stirs up instant and severe resentment as action taken by someone which vitally concerns us and which he failed to discuss with us." Carey, H. H., *Consultative Supervision*, Nations Business (April, 1937), p. 44, and accompanying photograph.

As early as 1918, Mr. Justice Brandeis, speaking of the necessity of consulting and obtaining the approval of the workers before introducing changes in methods of production pointed out that "In a democratic community men who are to be affected by a proposed change of conditions should be consulted, and the innovators must carry the burden of convincing others at each stage in the process of change that what is being done is right." Brandeis, Louis D., *Efficiency by Consent*, Industrial Management (February, 1918), p. 108. See also, Leiserson, Wm. M., *The Meaning of Labor Representation*, Annals of the American Academy of Political and Social Science, Vol. 90 (July, 1920), pp. 22–23. "The real importance of collective bargaining consists in the fact that it offers wage-earners the opportunity to participate effectively in determining the conditions under which they work." Twentieth Century Fund, *Labor and the Government* (New York, 1935), pp. 5–6.

frustrates that desire necessarily discourages self-organization. The frustration in this case, as the Board pointed out, was particularly severe, for, "were the [petitioner] successful in obtaining approval of its proposed wage adjustments, under the circumstances of the war emergency, this might result in the Union being foreclosed for an indefinite period from effective bargaining with reference to the wages of employees for whom it had been certified as bargaining representative" (R. 52). By thus practically removing rates of pay, the most essential element in the employment relation, from the field of negotiation open to the Union, petitioner took the heart out of collective bargaining and destroyed *pro tanto* the value of union membership in the eyes of the employees.

Petitioner was here engaged in challenging the right of the employees to organize and bargain collectively altogether. Shortly before petitioner filed its application for approval of the wage increases, the Union had requested bargaining concerning wages (R. 193), and petitioner had flatly refused to bargain (R. 194). By thereafter deliberately ignoring the Union while deciding to increase wages $2 per week retroactive to September 3, 1943, and then informing the employees of its unilateral application to the War Labor Board for approval of the plan, petitioner, as in *Matter of Wilson & Co.*, 19 N. L. R. B. 990, 999, enforced, 115 F. 2d 759, 763 (C. C. A. 8), "dealt

a severe blow to the Union's prestige by demonstrating to the employees that [petitioner] considered collective bargaining with the Union neither desirable nor necessary." Petitioner carried its attack upon the Union still further. Soon after the Union had filed charges based in part upon petitioner's unilateral action, petitioner departed from its earlier announced intention not to discuss the matter further with the employees until word had been received from the War Labor Board concerning the progress of the application, and intimated in a speech over the store's public address system that the projected wage increase might be jeopardized if the Union took any steps to vindicate its position as bargaining agent (R. 189–190). "It was fairly inferable that the employer, by this action, intended to humiliate the Union representatives and discredit them in the eyes of their fellow employees." *Inland Lime and Stone Co.* v. *National Labor Relations Board*, 119 F. 2d 20, 22 (C. C. A. 7).

The Board's conclusions, sustained by the court below, that petitioner's actions may "reasonably be said to have undermined the Union among employees for whom it had been certified as bargaining representative, and to have discouraged employees generally in their union affiliation" finds support in the Board's experience. Such object lessons in the futility of self-organization and collective bargaining have often resulted in wholesale defection of union members. See, *e. g.*,

Oughton v. *National Labor Relations Board,* 118 F. 2d 486, 494, 498 (C. C. A. 3), certiorari denied, 315 U. S. 797; *National Labor Relations Board* v. *George P. Pilling & Son Co.,* 119 F. 2d 32, 38–39 (C. C. A. 3); *Matter of Riverside Manufacturing Company,* 20 N. L. R. B. 394, 400–407, enforced, 119 F. 2d 302 (C. C. A. 5); *Medo Photo Supply Corp.* v. *National Labor Relations Board,* 321 U. S. 678, 687. Where unions have been recognized and collective bargaining agreements are in effect, similar autocratic action by employers, even though it conferred benefits upon the employees, has been productive of strikes.[25]

The alleged dilemma in which petitioner found itself, *i. e.,* of excluding the employees in the unit from its application and risking charges of discrimination, or withholding its application altogether and denying wage increases to all of its employees, was created by petitioner's determination to disregard its statutory obligations. Here, as in the *Medo* case, 321 U. S. 678, 686–687, "either consequence, as well as any violation of the Act, would * * * have been avoided, if the employer, as is its statutory duty," had recognized and bargained with the Union as it had with the electricians and other craft groups (*supra,* p. 10).

[25] Chamberlain, Neil, *op. cit. supra,* note 15, pp. 375-376, notes 3 and 4; Golden, Clinton S., and Ruttenberg, Harold J., *The Dynamics of Industrial Democracy* (New York, 1942), pp. 100–101; Twentieth Century Fund, *How Collective Bargaining Works* (New York, 1942), pp. 553, 680–681, 799–800.

In declining to be guided by the Board's certification, petitioner acted at its peril. As the court below held, "the certificate is valid until declared invalid by the court or replaced by the Board. *National Labor Relations Board* v. *Appalachian Electric Power Co.*, 4 Cir., 140 F. 2d 217, 222. The refusal of the employer to recognize the certificate does not excuse compliance * * *" (R. 272).[26] Petitioner contends in effect that its original unfair labor practice, the refusal to recognize or bargain with the Union, should be treated as immunizing it from the consequences of such further attacks upon the employees' right of self-organization as it might care to launch. But clearly each invasion of the rights of employees under the Act is a separate violation,[27] and it can hardly be contended that successive violations are to be ignored merely because all are predicated upon the same erroneous assumption that the em-

[26] *Valley Mould & Iron Corp.* v. *National Labor Relations Board*, 116 F. 2d 760, 764–766 (C. C. A. 7), certiorari denied, 313 U. S. 590; *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. 2d 876, 878–881 (C. C. A. 3), certiorari denied, 319 U. S. 751; *National Labor Relations Board* v. *Century Oxford Manufacturing Corp.*, 140 F. 2d 541 (C. C. A. 2), certiorari denied, 323 U. S. 714.

[27] See, *e. g.*, *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332, 334, 352, *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678, 684–685; *Consolidated Aircraft Corp.* v. *National Labor Relations Board*, 141 F. 2d 785 (C. C. A. 9).

ployees are not entitled to rights under the Act.[28] An unsuccessful attack upon a Board certification, like an unsuccessful attack upon the Board's jurisdiction, does not shield unfair labor practices from statutory sanctions.

Nor was petitioner required to engage in the additional unfair labor practices in order to maintain its right to challenge the Board's certification. Petitioner could have bargained with the Union concerning the proposed increase insofar as it concerned the employees in the unit and filed a joint application for a wage increase with the Union (see R. 196A),[29] while at the same time continuing to refuse to recognize the Union generally.

Instead, petitioner chose to place the Union in a genuine dilemma. The Union was compelled either to stand by and take the risk of losing its membership by acquiescing in wage increases concerning which it had no opportunity to bargain, or to request the War Labor Board not to consider petitioner's application for a wage increase

[28] *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. 2d 678, 680–681 (C. C. A. 6), certiorari denied, 308 U. S. 568; *National Labor Relations Board* v. *Chicago Apparatus Co.*, 116 F. 2d 753, 755–756, 758–759 (C. C. A. 7); *National Labor Relations Board* v. *Whittier Mills Co.*, 111 F. 2d 474, 477–479 (C. C. A. 5); *National Labor Relations Board* v. *Schmidt Baking Co., Inc.*, 122 F. 2d 162, 163–164 (C. C. A. 4).

[29] The regulations of the War Labor Board which provide for such joint applications are set forth in Appendix B, *infra*, pp. 79–81.

insofar as it affected the bushelmen.[30] To force an organization to either step is almost to compel its self-destruction as a collective bargaining representative. Moreover, by implying, in the address on September 14, 1943, that if the employees received the wage increase they would have only petitioner to thank, whereas if they did not receive it they would have only the Union to blame, petitioner created an apparent conflict of interest between the employees and the Union and brought home to the employees the dilemma in which the Union found itself as a result of petitioner's illegal conduct. To so condition employment benefits upon sacrifice by the employees of their right to take steps to vindicate self-organization and collective bargaining is to strike a potent blow at the rights themselves. Cf. *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678, 685–686.

II

THE BOARD HAD AUTHORITY TO INSERT, IN ITS ORDER, THE CEASE AND DESIST PROVISIONS SUSTAINED BY THE COURT BELOW

As we have shown (*supra*, pp. 10–13, 20–38), the Board properly found that petitioner (1) "by its

[30] The Union took the latter course. On October 12, 1943, it filed objections with the Regional War Labor Board to the processing of petitioner's application insofar as it affected the employees in the unit. On October 14, 1943, the Regional Board accordingly, in view of the petitioner's request (see *supra*, p. 11), eliminated the bushelmen from the application. In re *May Department Stores Co.*, N. W. L. B. Case No. 7–6585 (unreported).

unilateral action in seeking approval of its proposed wage adjustments" (R. 53), and (2) "by statements of its officers and its publication Store Chat addressed to employees concerning said unilateral action" (R. 53), violated Section 8 (1) of the Act (R. 54). Translating this finding into the statutory terms, it appears that the Board found that petitioner had interfered with, restrained, and coerced its employees in the exercise of their

> right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> [R. 53, Sections 8 (1) and 7, Appendix, A, infra, p. 76.]

Section 10 (a) of the Act (Appendix A, *infra*, pp. ~~76-77~~ 77-78) empowers the Board "to prevent any person from engaging in any unfair labor practice (listed in Section 8)", and Section 10 (c) authorizes the Board to issue and cause to be served on the employer found to have committed "any such unfair labor practice" "an order requiring such person to cease and desist from such unfair labor practice." (Appendix A, *infra*, p. 78.)

Consequently, the Board, having found that petitioner had "refused to bargain collectively with the Union" (R. 51), ordered petitioner to "Cease and desist from: (a) Refusing to bargain

collectively" with the Union (R. 45–46). Having in addition, found that petitioner had violated Section 8 (1) in the manner set out above and by its refusal to bargain, the Board order (R. 46), as modified (R. 285), required petitioner to "Cease and desist from:"

> (b) In any other manner interfering with, restraining, or coercing its employees who are referred to in paragraph 1 (a) in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act.

Despite the fact that in paragraph 1 (b) of its order, the Board literally complied with the statutory command to enjoin "such unfair labor practice"—the violation of Section 8 (1)—petitioner challenges that part of the order on the ground that it restrains "the Petitioner from acts which it is not claimed that Petitioner committed. And there is no basis in Petitioner's past conduct to suggest that other violations of the Act should be anticipated" (Br. 47–48).

National Labor Relations Board v. *Express Publishing Co.*, 312 U. S. 426, is the leading authority invoked by petitioner and to which we

turn in assessing petitioner's challenge to paragraph 1 (b) of the Board's order. In that case, the Fifth Circuit Court of Appeals had set aside the Board's finding that the company had violated Section 8 (1) by making certain statements to its employees. See 312 U. S. at 428, note 1; and 441, note 2, in the dissenting opinion. All that remained to support the Board's order, worded in terms substantially like those of paragraph 1 (b) of the order in the instant case, was the finding that the company had refused to bargain with the union; had, therefore, violated Section 8 (5), Appendix A, *infra*, p. 76; and had, therefore, also violated Section 8 (1). This Court held that the violation of Section 8 (5) was merely a "technical violation" of Section 8 (1), and that that type of Section 8 (1) violation did not warrant a broad order to cease and desist from violating Section 8 (1).

But here, the Board found an independent, serious, and far-reaching violation of Section 8 (1), quite apart from the refusal of petitioner to bargain. See *supra*, pp. 10, 13, 20–38. Hence, this Court's decision in the *Express Publishing* case, as the court below held (R. 269), does not stand in the way of paragraph 1 (b) of the order in this case.

Significantly, petitioner nowhere proposes a substitute for the order enforced by the court below. This is not surprising, for a consideration

of the conceivable alternatives compels the conclusion that the order, as it stands, is neither too broad nor defective in any other way, but is an appropriate exercise of the Board's remedial powers. While there are infinite variations in the alternative orders which logically might be considered appropriate, they roughly fall into four categories: (1) An order which merely enjoins a repetition of the specific acts committed, as for instance that petitioner shall not grant further wage increases to its employees without giving notice to the Union and affording the Union an opportunity to negotiate, and shall not issue written or oral statements to its employees concerning wage increases about which it has not negotiated or offered to negotiate with the Union. The possible variations of such an order are suggested by such problems as whether the order should be narrower and merely enjoin further unilateral applications to the War Labor Board or should be broader and also enjoin unilateral changes in hours and other conditions of employment. (2) An order which enjoins the employer from "interfering with" employees in the exercise of the rights guaranteed in Section 7 but does not use the terms "restraining or coercing." (3) An order which enjoins the employer merely with respect to the right to collective bargaining (which petitioner concedes it has infringed if the certification was valid), or merely with respect to the rights to self-organization and to bargain collec-

tively (the two rights most obviously invaded if any distinction can be made in this context), but does not, in terms, include the other rights listed in Section 7 of the Act. (4) An order which enjoins the employer from interfering with the efforts of a given union to organize his employees or to bargain with him on their behalf, or which enjoins an employer from interfering with his employees in their efforts to join or utilize the bargaining facilities of a particular union, rather than one which protects the employees' rights irrespective of the union through which they choose to bargain.

Any argument that the order should be limited merely to a prohibition of a repetition of the specific acts committed rather than to a prohibition of the type of unfair labor practice committed is precluded by this Court's decision in *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 439. In that case, the Circuit Court of Appeals for the Fifth Circuit struck entirely a paragraph of a Board order worded in terms substantially like those used in paragraph 1 (b) of the order in the instant case. This Court restored part of the stricken language by directing that the court enter a decree which required the employer to cease and desist from "in any manner interfering with the efforts of the [union] to bargain collectively with the" employer, and did not limit the order to interference by a repetition of specific conduct theretofore engaged in by the

employer which had been found to constitute interference, namely the refusal to bargain. Nor did the Court contemplate that only interference by the method theretofore used could be regarded as contempt, for it pointed out that a "discriminatory discharge of union members may so affect the bargaining process as to establish a violation of the order" (312 U. S. at 437). The Court summarized the general equity rule in the federal courts: "A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past" (312 U. S. at 435). Previously, adapting general equity practice to enforcement of the rights to self-organization guaranteed in the Railway Labor Act, this Court had sustained a contempt adjudication based on discriminatory discharges where the original injunction order was worded similarly to paragraph 1 (b) of the instant decree and had been based on acts of domination of a company union. *Texas & N. O. R. Co.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, 555–556. This Court, in that case, rejected contentions of the employer that the contempt adjudication was based on acts unrelated to those giving rise to the injunction and that the injunctions as so interpreted were framed in such general language "that they [kept] petitioners

in constant jeopardy of contempt with no basis for determining what action in the management and operation of the railroad may be a violation of the injunction" (281 U. S. at 552, 571).[31]

The language of Section 10 of the Act (Appendix A, *infra*, pp. 76-77) has, until recently, uniformly been construed by the circuit courts of appeals as evidencing a Congressional intent that Board orders be framed to prohibit all unfair labor practices of the type or class committed, and not merely the repetition of the precise form of acts previously committed or the commission of substantially identical acts. Referring to this language, the Circuit Court of Appeals for the Ninth Circuit has said:[32]

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[31] For the converse situation, see *National Labor Relations Board* v. *Arcade-Sunshine Co., Inc.*, 122 F. 2d 964–965 (App. D. C.). That case involved contempt proceedings arising under a paragraph of a decree which was worded much like paragraph 1 (b) of the order in the instant case. The decree was based on discriminatory discharges and other interferences, and the employer's acts in establishing a company union were held "so related in their general nature to those enjoined in our decree as to make evidence in relation to them relevant." Cf. *National Labor Relations Board* v. *American Mfg. Co., Inc.*, 132 F. 2d 740 (C. C. A. 5), certiorari denied, 319 U. S. 743; *Reliance Mfg. Co.* v. *National Labor Relations Board*, 143 F. 2d 761 (C. C. A. 7); *National Labor Relations Board* v. *Lowenstein & Sons*, 121 F. 2d 673, 674 (C. C. A. 2).

[32] *National Labor Relations Board* v. *National Motor Bearing Co.*, 105 F. 2d 652, 660–661 (C. C. A. 9). See also *Bethlehem Steel Co.* v. *National Labor Relations Board*, 120 F. 2d 641, 647–648 (App. D. C.); *National Labor Relations*

When the Board has made a finding, supported by substantial evidence, that an act has been done which is prohibited as an unfair labor practice, the fair intent of the statute is that the Board is warranted in ordering desistance from such an unfair labor practice generally and is not required to limit its order so as to compel cessation only of the particular and limited activity found to have taken place.

* * * Had Congress intended that the Board should be limited to requiring desistance from the particular mode found by

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Board v. *Reed & Prince Mfg. Co.*, 118 F. 2d 874, 890–891 (C. C. A. 1), certiorari denied, 313 U. S. 595; *Sperry Gyroscope Co., Inc.* v. *National Labor Relations Board*, 129 F. 2d 922, 931 (C. C. A. 2); *National Labor Relations Board* v. *T. W. Phillips Gas & Oil Co.*, 141 F. 2d 304, 306 (C. C. A. 4); *National Labor Relations Board* v. *Entwistle Mfg. Co.*, 120 F. 2d 532, 536 (C. C. A. 4); *National Labor Relations Board* v. *Bersted Mfg. Co.*, 124 F. 2d 409, 412 (C. C. A. 6), denying rehearing and modifying, 128 F. 2d 738; *National Labor Relations Board* v. *Continental Oil Co.*, 121 F. 2d 120, 125–126 (C. C. A. 10). See also petition for a writ of certiorari in *National Labor Relations Board* v. *Cheney California Lumber Co.*, No. 319, this Term, pp. 17–21.

Four circuits have recently taken the other view. See *General Motors Corporation* v. *National Labor Relations Board*, 150 F. 2d 201 (C. C. A. 3); *National Labor Relations Board* v. *Lipshutz*, 149 F. 2d 141 (C. C. A. 5); *Le Tourneau Company of Georgia* v. *National Labor Relations Board*, Case No. 10954 (C. C. A. 5); *National Labor Relations Board* v. *Serrel, Inc.*, 149 F. 2d 542 (C. C. A. 7); *National Labor Relations Board* v. *Cowell Portland Cement Co.*, 148 F. 2d 237 (C. C. A. 9), petition for a writ of certiorari filed, No. 231, this Term; *National Labor Relations Board* v. *Cheney California Lumber Company*, 149 F. 2d 333 (C. C. A. 9), petition for a writ of certiorari filed, No. 319, this Term.

> the Board to have been followed in the past by the employer to accomplish a particular unfair labor practice no doubt it would have been provided that the Board should order desistance from the *act* by which the unfair labor practice was perpetrated. It is probable that Congress refrained from such limitation of the Board's authority as is here suggested in consideration of the evident fact that the methods by which a given unfair labor practice may be committed are so varied and numerous that the protection granted to employees by the Act would be largely ineffectual if each variation on the same theme necessitated a separate hearing and a specific prohibitory order.

This construction of the statute is reenforced by an examination of the statutory scheme for enforcement. Since the only sanction provided is the injunctive decree and contempt proceedings based thereon, unless the lengthy proceedings before the Board and the courts, which always precede any injunctive decree, result in an order broad enough to protect the right invaded, the Act will bog down in procedural delays. "The act would be ineffectual if each new example of interference, domination, etc., required a new hearing and a new order." *Bethlehem Steel Co.* v. *National Labor Relations Board,* 120 F. 2d 641, 647–648 (App. D. C.). The legislative history of the enforcement provisions of the Act makes it clear

that Congress did not intend to give an employer who had violated the Act a "second free bite at the apple." See Note (1940) 53 Harv. L. Rev. 472, 473. It was not anticipated, for example, that the Board would be denied enforcement of its orders simply because it had not shown that the employer could be expected again to commit unfair labor practices in the future. As the conference report on the bill which became the Act states (H. Rep. No. 1371, 74th Cong., 1st Sess., p. 5):

> neither the administrative body nor the courts are required to assume in the ordinary case that the unlawful practice in question, even though presently terminated, will not be resumed in the future. If such practice is resumed there will be immediately available to the Board an existing court decree to serve as a basis for contempt proceedings.

It is apparent from this history and from the Act itself (see *supra*, pp. 39–40) that Congress intended enforcement orders to be broad enough to insure that any further violations of the Act falling within the same statutory classification as the practice already committed would be punishable as a violation of the decree. It was not contemplated that the burden would be on the Board to prove that there was a threat of resumption, either of the specific practice found to have been committed or related unfair labor practices. Congress

made the legislative judgment that one violation of the Act was likely to lead to others.

An order which, in addition to restraining the identical form of act previously committed, also restrains substantially identical acts, is likewise inadequate. Here the petitioner's three unfair labor practices all stemmed from its opposition to collective bargaining by the bushelmen as a group (R. 194–195). Until the court forced the petitioner to recognize the rights of the bushelmen as an appropriate bargaining group, petitioner was obviously not going to observe these rights. That its previous failure to observe these rights happened to take the form of unilateral wage increases affords no reason to suppose that if there were future infringements, they would take a substantially identical form. For this reason, the order should enjoin all invasions of the rights granted to the bushelmen by Section 7, and not merely infringement by unilateral action.

Cases decided under other statutes which contemplate the use of injunctive orders to secure compliance support the view that the injunction issued against the person violating a statute may restrain the fundamental violation—the interference with self-organization and collective bargaining in the instant case—and need not be limited to the specific illegal method employed at the time—the unilateral wage increase, the written and oral statements, and refusal to bargain collectively in the case at bar. When the Board

frames its order, "doubts should be resolved in favor of the Government and against the [party violating the statute]." *Local 167, International Brotherhood of Teamsters* v. *United States*, 291 U. S. 293, 299. The "order to cease and desist should be broad and inclusive enough to *stop* the practices at once and for all time" (*Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. 2d 321, 329–330 (C. C. A. 7), certiorari denied, 323 U. S. 730), "broad enough to prevent evasion" (*Local 167* case, *supra* at 299), " 'to suppress the unlawful practices' and preclude their revival." *Union Pacific Railroad Co.* v. *United States*, 313 U. S. 450, 470. See *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 727 (Sherman Anti-Trust Act—"a mere prohibition of the precise scheme would be ineffectual to prevent restraints"); *Hill* v. *Federal Trade Commission*, 124 F. 2d. 104, 106 (C. C. A. 5); *Keller* v. *Federal Trade Commission*, 132 F. 2d 59, 61 (C. C. A. 7); *Hershey Chocolate Corp.* v. *Federal Trade Commission*, 121 F. 2d 968, 971–972 (C. C. A. 3) ("To be of any value the order must proscribe the method of unfair competition as well as the specific acts by which it has been manifested."); *Interstate Commerce Commission* v. *Keeshin Motor Express Co., Inc.*, 134 F. 2d 228, 231–232 (C. C. A. 7), certiorari denied, 320 U. S. 738.

The Board, from the beginning, adopted the practice of entering orders which were worded in the specific terms of the Sections of the Act

violated. See *Matter of Pennsylvania Greyhound Lines, Inc.*, 1 N. L. R. B. 1, 51, enforced in this respect, *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 91 F. 2d 178 (C. C. A. 3), reversed in other respects, 303 U. S. 261. This practice has been followed by state labor relations boards.[33] The Federal Trade Commission likewise has entered its orders in a form broad enough to prohibit the general practice of which the specific conduct in question is an example, rather than limiting its order to the precise misrepresentation, or unfair conduct, or improper practice, found. For instance, where there had been the payment of secret commissions to an employee of a single customer, the Commission held the company guilty of commercial bribery and issued an order to cease and desist from that practice in general.[34]

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[33] See, *e. g.*, *Matter of Charles C. Loehmann Corp.*, 6 N. Y. S. L. R. B. 26–41; *Matter of Bishop, McCormick and Bishop*, 6 N. Y. S. L. R. B. 73, 88; *Folding Furniture Works, Inc.* v. *Wisconsin Labor Relations Board*, 232 Wis. 170.

[34] *Federal Trade Commission* v. *Rockford Varnish Co.*, Docket No. 41. The complaint, findings, and order are not published, the case being merely referred to in a footnote in 1 F. T. C. D. 105; *Federal Trade Commission* v. *Raeder, Adamson Co.*, 4 F. T. C. D. 129. In *Federal Trade Commission* v. *The Oakes Co.*, 3 F. T. C. D. 36, upon a showing of commercial espionage against one competitor the order prohibited the practice in general. Cf. *Federal Trade Commission* v. *Boston Piano & Music Co.*, 3 F. T. C. D. 168, par. 3 of order. See a discussion of this problem in Henderson, Gerard C., *The Federal Trade Commission* (1924), pp. 72–77.

In view of this uniform administrative practice, which clearly comports with the Congressional intention and has been accepted by the courts, any contention that paragraph 1 (b) of the order in the instant case should be modified by restricting it to a prohibition of unilateral changes in wages or other terms of employment, or written or oral statements to employees respecting such changes, or substantially identical acts, must be rejected.

The possibility of modifying the order by eliminating the words "restraining or coercing," must also be rejected. Since an order to cease interfering would be violated by any act of restraint or coercion, eliminating these words from the order would not actually limit the scope of the order in any respect. Every act which would be contemptuous under the order with those words retained would likewise be contemptuous under the order with those words eliminated. Such a modification would merely tend to mislead the employer respecting his duties under the order.

The possibility of modifying the order to eliminate some of the rights listed as protected against interference in the future may seem to be the most plausible at first glance, for in the *Express Publishing* case, this Court made that form of modification, striking from the order a reference to all the rights listed in Section 7 of the Act except the right to collective bargaining. As we have shown, however (*supra*, pp. 40–41), this case is substantially different. In the *Express Pub-*

lishing case, the employer's only violation of the Act had been its refusal to bargain collectively. Nevertheless, this Court recognized that even a refusal to bargain collectively might warrant an order protecting all the rights listed in Section 7 of the Act, if the Board had made a "finding based either on the specific circumstances disclosed by the record or on its own expert judgment of their [the acts constituting the refusal to bargain] relation to the policy embodied in § 7, or as to any relationship or probable relationship of respondent's refusal to bargain and the other types of unfair labor practices some of which are enumerated in § 8" (312 U. S. at 434). In the instant case, the Board not only found two distinct violations of Section 8 (1) of the Act, but showed the relationship between the company's unfair labor practices and all the rights listed in Section 7.

It is clear that the "right of self-organization" cannot be eliminated from the order, because the Board found that petitioner had interfered with the exercise of that right by "nullifying [the Union's] efficacy as a bargaining agent" (R. 52) and by acts and statements which placed the employees in a position of abandoning either collective bargaining about wages for an indefinite period or the wage increase (R. 52). The "right to form, join, or assist labor organizations," was similarly interfered with by this conduct which "discouraged employees generally in their union

affiliation" (R. 52.) And the "right to bargain collectively through representatives of their own choosing" was infringed not only by the refusal to bargain but also by the unilateral action respecting the wage increases. Finally, it is apparent that, for the same reasons, the "right to engage in concerted activities, for the purpose of collective bargaining or other mutual aid and protection" was also transgressed."[35] These are the sum and

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[35] The Board has often found that acts of an employer by which employees are led to believe that their employer will not allow them to achieve any benefits through collective bargaining are violative of each of the rights guaranteed by Section 7. An employer's statement to his employees "that collective bargaining would fail, if undertaken as to major purposes" was held by the Board to "constitute an anticipatory denial of possible advantages to be derived from collective bargaining" and to be "obstructive of the employee's rights to self-organization." *Matter of J. Allen Smith & Co.*, 27 N. L. R. B. 1386, 1390-1391. "Were the Act to sanction such notice by the employer, he could with equal impunity further forestall and defeat union organization by announcing to his employees that under no circumstances would he recognize seniority among his employees for the purpose of lay-offs, that under no circumstances would he consider a change in the hours of employment, that under no circumstances would he consider *any* change in any other term or condition of employment. In effect, at the outset of union organization he could discourage his employees from becoming members by warning them that any possible advantage to be derived from such membership and from collective bargaining was beyond their reach. We cannot permit the purposes of the Act to be so flouted. In the light of all the evidence we find that the notice had the sole purpose of anticipating and denying to employees a possible advantage to be derived from collective bargaining negotiations. As such it amounted to discouragement of member-

substance of the rights protected by paragraph 1 (b) of the order.[36]

The legislative history of the Act itself supports the Board's conclusions in this case with respect to the relationship between what petitioner did and the rights granted by Section 7. The Senate Report on the bill that became the Act described the bill as "encouraging the practice

ship in the Union." *Matter of Roberti Bros., Inc.*, 8 N. L. R. B. 925, 929. See also *Matter of Gulf Public Service Co.*, 18 N. L. R. B. 562, 580–581; *Matter of Continental Box Co., Inc.*, 19 N. L. R. B. 860, 865–866; *Matter of Blossom Products Corp.*, 20 N. L. R. B. 335, 338–340; *Matter of Hawk & Buck Co.*, 25 N. L. R. B. 837, 840–842; *Matter of Bemis Bros. Bag Co.*, 28 N. L. R. B. 430, 434–436; *Matter of Columbian Iron Works*, 43 N. L. R. B. 73, 78–81.

[36] The attempt of courts to eliminate from their orders one or more of the rights listed in Section 7 has given rise to a great deal of confusion and inconsistency in practice. In *National Labor Relations Board* v. *Pacific Gas & Electric Co.*, 118 F. 2d 780, 789–791 (C. C. A. 9), the court stated that this Court's decision in the *Express Publishing* case was "not free from doubt" but apparently required that in a case which involved only a violation of Section 8 (1) there be omitted from the order any reference to the right "to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection." The same circuit has recently, in a case involving, as to one respondent, only violations of Section 8 (2) of the Act (and the violation of Section 8 (1) involved in the Section 8 (2) violation), left in the order a reference to all the rights mentioned in Section 7 except the right to engage in concerted activities for "other mutual aid and protection". *National Labor Relations Board* v. *Morris P. Kirk & Son, Inc.*, decided August 30, 1945 (C. C. A. 9),

of collective bargaining and protecting the rights upon which it is based." S. Rep. No. 573, 74th Cong., 1st Sess., p. 6. See also H. Rep. No. 1147, 74th Cong., 1st Sess., p. 8. These reports make it clear that the guaranties of Sections 7 and 8 (1) are not limited or restricted by the enumeration of unfair labor practices in the other subsections of Section 8; those subsections merely "spell out with particularity some of the practices that have been most prevalent and most troublesome." S. Rep. No. 573, 74th Cong., 1st Sess., p. 9; H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 7, 15, 17; *Art Metals Construction Co.* v. *National Labor Relations Board*, 110 F. 2d 148, 150–151 (C. C. A. 2); *National Labor Relations Board* v. *Newark*

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modifying and enforcing 41 N. L. R. B. 807, 840–842. In *National Labor Relations Board* v. *Youngstown Mines Corp.*, 123 F. 2d 178, 181, 182 (C. C. A. 8), involving violations of only Section 8 (1) and (2), the court modified the order to read substantially as follows "In any manner interfering with, restraining, or coercing their employees in the exercise of their right to bargain collectively through representatives of their own choosing, and to engage in concerted activity for the purpose of collective bargaining, as guaranteed in § 7 of the National Labor Relations Act." See also *National Labor Relations Board* v. *Grower-Shipper Vegetable Ass'n*, 122 F. 2d 368, 377 (C. C. A. 9); *Singer Mfg. Co.* v. *National Labor Relations Board*, 119 F. 2d 131, 139–140 (C. C. A. 7), certiorari denied, 313 U. S. 595; *National Labor Relations Board* v. *Continental Oil Co.*, 121 F. 2d 120, 125–126 (C. C. A. 10); *Canyon Corp.* v. *National Labor Relations Board*, 128 F. 2d 953, 956–957 (C. C. A. 8).

Morning Ledger Co. 120 F. 2d 262, 265, 266–267 (C. C. A. 3), certiorari denied, 314 U. S. 693. See National Labor Relations Board, *Sixth Annual Report* (1942), pp. 87–88.

The right protected by the National Labor Relations Act is specific and relatively narrow. A prohibition against "in any manner" interfering with that right does not place the employer at the peril of a summons for contempt for engaging in various types of unrelated conduct. He need only refrain from interfering with, restraining, or coercing his employees in the exercise of the right to self-organization and collective bargaining. While there are myriad and diverse ways of interfering with that right, it is, on the whole, a very simple right, and generally it does not require ingenuity to refrain from such interference. In the rare case where the employer has been in genuine doubt as to his obligations, criminal contempt would clearly be unavailable since the element of wilfulness would be absent. Civil contempt proceedings could be instituted only by the Board, and it, in the first instance, and then the court, if contempt proceedings were instituted, would take the employer's good faith into consideration in fashioning a remedy. See *McCrone v. United States*, 307 U. S. 61, 64; *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 441–442.

The other statutes under which this Court has

limited the scope of injunctions[37] are less specific than the National Labor Relations Act. For example, "unlike the Federal Trade Commission Act,[38] which deals somewhat analogously with unfair trade practices, this bill [the National Labor Relations Act] is specific in its terms." S. Rep. No. 573, 74th Cong., 1st Sess., p. 8; *National Labor Relations Board* v. *National Motor Bearing Co.*, 105 F. 2d 652, 661; cf. *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 427–428. The Sherman Anti-Trust Act[39] and the Interstate Commerce Act[40] are similarly distinguishable from the National Labor Relations Act. See Linkoff, *National Labor Relations Board—Limitation upon the Use of "Blanket Order"* (1941), 29 Geo. L. J. 1026, 1030; Note (1940) 53 Harv. L. Rev. 472, 475–476. Even under the Sherman Act, broad injunctions have, however, been upheld. *Standard Oil Co. of New Jersey* v. *United States*, 221 U. S. 1, 79–81; *Local 167, International Brotherhood of Teamsters* v. *United States*, 291 U. S. 293, 299; Note (1941) 54 Yale L. J. 141, 142.[41] It would be strange, indeed, if the Board,

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[37] *E.g.*, *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441, 455–457; *Swift & Co.* v. *United States*, 196 U. S. 375, 396, 402; *New York, N. H. & H. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, 404.

[38] 38 Stat. 719, 52 Stat. 111, 1,028, 15 U. S. C. 45.

[39] 26 Stat. 209, 15 U. S. C. 1–4.

[40] 32 Stat. 847, 34 Stat. 587, 49 U. S. C. 41.

[41] In the *Standard Oil* case, the injunction prohibited the defendants "from in any way conspiring or combining to

charged with protecting the public interest and operating under a statute of limited scope, were more stringently confined.

The fourth possibility of modification is also suggested by the change made in the *Express Publishing* case. There this Court substituted for the provision requiring the employer to cease interfering with its employees in the exercise of their right to collective bargaining, a provision requiring the employer to cease interfering with the efforts of the Newspaper Guild to bargain collectively. This form of modification has on occasion been adopted by the circuit courts of appeals but only in cases involving no unfair labor practice other than a refusal to bargain collectively.[42] Four circuit courts of appeals, on the other hand, have modified Board orders by inserting in the notice after the reference to the union involved in the case words such as "or any other

violate the [Sherman Anti-Trust] act." In the *Local 167* case, the decree enjoined the defendants "from using any of the offices or positions in Local 167 * * * 'for the purpose of coercing marketmen to buy poultry, poultry feed, or other commodities necessary to the poultry business from particular sellers thereof.'"

[42] See, for example, *Singer Mfg. Co.* v. *National Labor Relations Board*, 119 F. 2d 131, 139–140 (C. C. A. 7), certiorari denied, 313 U. S. 595; *National Labor Relations Board* v. *Calumet Steel Division of Borg-Warner Corp.*, 121 F. 2d 366, 371 (C. C. A. 7). For a case involving discriminatory discharges where the court refused thus to limit the order, see *Canyon Corp.* v. *National Labor Relations Board*, 128 F. 2d 953, 956 (C. C. A. 8).

labor organization of their choice." [48] This Court, in the *Express Publishing* case, did not discuss this modification and this issue, like the entire modification issue, had been briefed by neither of the parties.

The Board and the courts have uniformly treated the Act as conferring no rights on unions but solely on employees.[49] It would, therefore, seem to be improper to word the injunction in terms which protect the union from interference rather than the employee. Furthermore, since it is the em-

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[48] *National Labor Relations Board* v. *Baldwin Locomotive Works*, 128 F. 2d 39, 51 (C. C. A. 3); *National Labor Relations Board* v. *Weirton Steel Co.*, 135 F. 2d 494, 499 (C. C. A. 3); *National Labor Relations Board* v. *American Rolling Mill Co.*, 126 F. 2d 38, 42 (C. C. A. 6); *National Labor Relations Board* v. *Cleveland Cliffs Iron Co.*, 133 F. 2d 295, 302 (C. C. A. 6); *Reliance Mfg. Co.* v. *National Labor Relations Board*, 125 F. 2d 311, 322 (C. C. A. 7); *Butler Bros.* v. *National Labor Relations Board*, 134 F. 2d 981, 985 (C. C. A. 7), certiorari denied, 320 U. S. 789; *Cudahy Packing Co.* v. *National Labor Relations Board*, 102 F. 2d 745, 753 (C. C. A. 8); *National Labor Relations Board* v. *Harbison Walker Refractories Co.*, 135 F. 2d 837, 839–840 (C. C. A. 8).

[49] "* * * the National Labor Relations Act was passed for the primary benefit of the employees as distinguished from the primary benefit to labor unions, and the prohibition of unfair labor practices designed by an employer to prevent the free exercise by employees of their wishes in reference to becoming members of a union was intended by Congress as a grant of rights to the *employees* rather than as a grant of power to the union." *National Labor Relations Board* v. *Schwartz*, 146 F. 2d 773, 774 (C. C. A. 5).

ployees who have the right to self-organization and collective bargaining, and the union plays a part in the statutory scheme solely as an instrument which the employees utilize to achieve the statutory objectives, the order should not be limited to the protection of the employees' right to join and take advantage of the representation facilities of a particular union. An employer who opposes his employees' exercise of their right to collective bargaining commonly opposes these employees' freedom of choice with respect to other unions.[45] The order should therefore protect his employees in the exercise of their rights without limitation to their exercise through a given union.

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[45] In other cases, the Board found that petitioner had committed unfair labor practices where its employees had joined other unions. *Matter of May Company*, 38 N. L. R. B. 1154 (A. F. of L.—Warehouse Employees Union); *Matter of May Department Stores Co.*, 61 N. L. R. B. No. 258 (A. F. of L.—Elevator Operators and Starters). See also, 59 N. L. R. B. 976. Cases in which other employers opposed each of several successive unions which his employees sought to utilize as their agent for collective bargaining: *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272, 274; *Matter of Peyton Packing Co.*, 49 N. L. R. B. 828, enforced, 142 F. 2d 1009 (C. C. A. 5), certiorari denied, 323 U. S. 730; *Western Cartridge Co.* v. *National Labor Relations Board*, 134 F. 2d 240 (C. C. A. 7), certiorari denied, 320 U. S. 746; *Matter of Kaye Metal Products Co., Inc.*, 42 N. L. R. B. 119, 124–150, 51 N. L. R. B. 621, 623–626, enforced, 134 F. 2d 954 (C. C. A. 2), certiorari denied, 322 U. S. 728.

III

THE BOARD COULD PROPERLY FIND THAT THE EMPLOYEES IN PETITIONER'S BUSHELING ROOMS CONSTITUTE A UNIT APPROPRIATE FOR COLLECTIVE BARGAINING

Thus far we have dealt with the issues arising out of petitioner's challenge to the Board's finding that it had violated Section 8 (1) of the Act and its challenge to the scope of the order. We now turn, in this point and in the next, to the underlying question as to the validity of the certification.

The governing statutory standard for the Board's guidance in unit determinations is "to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act." Section 9 (b), Appendix A, *infra*, p. 75. In investing the Board with this function, Congress did not restrict the Board to the use of inflexible rules; designation of the appropriate unit is "obviously one for determination in each individual case" (H. Rep. No. 1147, 74th Cong., 1st Sess., p. 22). The power committed to the Board is, therefore, a broad discretionary one, the exercise of which is final, unless clearly arbitrary or capricious. *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 113 F. 2d 698, 701 (C. C. A. 8), affirmed, 313 U. S. 146; *International Association of Machinists* v. *National Labor Relations Board*, 110 F. 2d 29, 46 (App.

D. C.), affirmed, 311 U. S. 72; *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. 2d 876, 880 (C. C. A. 3), certiorari denied, 319 U. S. 751; *National Labor Relations Board* v. *Lettie Lee, Inc.*, 140 F. 2d 243, 247–248 (C. C. A. 9). The Board's determination in the instant case that the bushelmen constitute an appropriate bargaining unit was a proper exercise of the Board's discretion and is in no sense arbitrary.

The evidence relating to the work of the bushelmen (*supra*, pp. 4–5) plainly establishes that their functional homogeneity justifies grouping them separately for bargaining purposes. A further consideration, relied upon by the Board, emphasizes the propriety of the Board's grouping. The bushelmen were fully organized and had expressed a desire to be represented in a separate unit, and no labor organization claimed to represent petitioner's employees on a more comprehensive scale. Where other factors are favorable, the Board, as in the instant case, follows the salutary policy of permitting immediate access to the Act's machinery to small, fully organized groups of employees with mutual interests in the subject matter of collective bargaining.

As early as 1937, the Board stressed the "extent or organization" factor in its unit determinations as an important consideration in giving effect to the policies of the Act. *Matter of R. C. A. Communications, Inc.*, 2 N. L. R. B. 1109, 1115; *Matter of Gulf Oil Corp.*, 4 N. L. R. B.

133, 137. The "extent of organization" principle has since been reiterated by the Board in a long series of decisions [46] and has received judicial approval. *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 132–135; *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. 2d 876, 880–881 (C. C. A. 3), certiorari denied, 319 U. S. 751; *National Labor Relations Board* v. *Lettie Lee, Inc.*, 140 F. 2d 243, 247–248 (C. C. A. 9).

The soundness of the doctrine in question as a means of "encouraging the practice and procedure" of collective bargaining" (National Labor Relations Act, Section 1) is amply demonstrated. Had the Board dismissed the Union's petition for certification, a group of employees, seeking to bargain collectively, would have been denied the opportunity of utilizing the machinery of the Act for the solution of their problems until such indefinite time in the future as the employees of the entire store should become organized.[47]

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[46] *E. g.*, *Matter of Swift & Co.*, 42 N. L. R. B. 1184, 1186–1187; *Matter of Pacific Gas & Electric Co.*, 44 N. L. R. B. 665, 670–671; *Matter of M. D. Baldwin, et al. d/b/a Oliver Machinery Co.*, 47 N. L. R. B. 440, 442–443, enforced without opinion, December 16, 1943, 13 L. R. R. 641 (C. C. A. 6); *Matter of Gardner-Richardson Co.*, 52 N. L. R. B. 1260, 1262–1263; *Matter of Richmond Greyhound Lines, Inc.*, 52 N. L. R. B. 1532, 1534; *Matter of The J. L. Hudson Co.*, 56 N. L. R. B. 406, 408–410. See *supra*, note 6, p. 7.

[47] Only a few months prior to the instant proceeding, the Board in *Matter of May Department Stores*, 46 N. L. R. B. 305, dismissed a petition for investigation of representa-

Surely an employer's asserted inconvenience in bargaining with such a unit is no justification for such an unjust result, for in such a situation the employer "'does not consider it impractical to bargain with every single employee separately.'"[47] *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. 2d 876, 880 (C. C. A. 3), certiorari denied, 319 U. S. 751, quoting *Matter of The Warfield Co.*, 6 N. L. R. B. 58, 64. Nor may the unit which application of this principle creates be challenged solely because an industrial store-wide unit might eventually be more desirable. A bargaining unit is not rendered improper merely because further organization and maturity of bargaining relations might make a

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tives on the ground that no labor union organizing employees in the Famous-Barr store and involved in that proceeding had made a substantial showing of representation of employees in a store-wide unit. The propriety of a craft unit was not in issue, and the Board's determination that an industrial unit would be appropriate does not foreclose its finding that a craft unit is also appropriate when the industrial unit is not organized. (See note 49, *infra*, p. 66. Subsequent to the certification and refusal to bargain in the instant case, the Board entertained a petition and directed an election in a storewide unit, excluding bushelmen. 54 N. L. R. B. 230. This election was later set aside upon the Board's findings of unfair labor practices committed by petitioner. 61 N. L. R. B., No. 258.

[47] For more than 20 years, petitioner has been bargaining and contracting with numerous craft unions representing teamsters, electricians, carpenters, painters, and upholsterers. Petitioner has also contracted with carpet layers, shoe repair workers, and picture frame workers (*supra*, p. 6).

larger unit more appropriate. The fact that the Union in this case accepts membership and is now seeking to organize on a store-wide basis does not require the Board to deny a small presently organized craft group access to the Act's election machinery; nor does the Board's present action foreclose it in the future from reshaping the bargaining unit upon a more comprehensive basis."[49] While, in some situations, the Board lends approval to store-wide units in department-store cases, it frequently holds a craft or related unit appropriate.[50]

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[49] Petitioner's fears (Br. 27) that the operations of its store may be disturbed by a long series of elections each conducted on a craft basis are wholly speculative. In applying the "extent of organization" principle the Board frequently points out, as it did here (R. 11, 13), that changes in the status of self-organization among the employees, foreseeable because of a union's broad organizational efforts, would require a subsequent enlargement of the unit. See, for example, *Matter of Knaust Brothers, Inc.*, 36 N. L. R. B. 915, 920; *Matter of Eves and Andresen*, 42 N. L. R. B. 1209, 1211–1212; *Matter of Foster-Grant Co., Inc.*, 32 N. L. R. B. 486, 489–490; *Matter of Crescent Dress Co.*, 29 N. L. R. B. 351, 354. Conversely, the previous unsuccessful attempts of a union to organize on a broader basis than the unit for which it petitions is not fatal to such a petition. *Matter of Standard Overall Co.*, 53 N. L. R. B. 960, 963.

[50] *E. g., Matter of The May Department Stores Co.*, 39 N. L. R. B. 471, 476–478; *Matter of J. L. Brandeis & Sons*, 47 N. L. R. B. 614, 616–617, enforced, 142 F. 2d 977, 981 (C. C. A. 8), certiorari denied, 323 U. S. 751; *Matter of Marshall Field & Co.*, 36 N. L. R. B. 748, 754–757, 758, 759–761; *Matter of The J. L. Hudson Co.*, 49 N. L. R. B. 273,

The Board properly rejected petitioner's contention that the employees in the women's alteration department and the fur work room must be included in the unit (R. 11). The facts that the women's clothing alteration workers are employed in a different part of the store from the men's,[51] that there was no such interchange of employees from one to the other as might be regarded as a practice, and that such transfers as did occur were either permanent or were intended to reduce the size of the busheling force (*supra*, note 7, p. 8), convinced the Board that there was no fluidity of interchange of personnel requiring a broader unit in order to make collective bargaining effective (R. 11). Finally, in rejecting petitioner's attempt to expand the unit, the Board (R. 11) took note of the fact that, traditionally, where alteration departments have been organized on a craft basis, the women's and men's alteration workers have been represented by separate craft unions (*supra*, pp. 7–8). It should also be noted that there were claims by another union that it represented large numbers of employees in the women's alteration

275–276, enforced without opinion, October 18, 1944, 15 L. R. R. 321 (C. C. A. 6); *Matter of Meier & Frank Co., Inc.*, 55 N. L. R. B. 101, 102–103; *Matter of The J. L. Hudson Co.*, 56 N. L. R. B. 406, 408–410.

[51] There is no inconsistency between the Board's partial reliance on this physical separation as a ground for excluding the women's alteration workers, and its inclusion of the basement bushelmen (cf. Br. 23). Physical separation is a factor to be considered, but it is by no means determinative.

department and that such department constituted an appropriate bargaining unit (R. 259–260).[52]

There is no merit to petitioner's suggestion that no rational basis exists to support a simple craft unit of bushelmen—one of the oldest organized crafts in the United States.[53] This readily identifiable, homogeneous group of workers, engaged in a traditional skilled craft, constitutes the archetype of an appropriate unit.

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[52] There was no such claim by a rival union in *Matter of J. L. Brandeis & Sons*, 47 N. L. R. B. 614, 617, enforced, 142 F. 2d 977, 981 (C. C. A. 8), certiorari denied, 323 U. S. 751, upon which petitioner relies (Br. 26). There is no merit to the petitioner's contention (Br. 25–27), that the grouping in one unit of employees engaged in altering men's, women's, and boys' clothing in the *Brandeis* case shows impropriety by the Board in excluding women's alteration and fur room employees from the bushelmen's unit in the instant case. In the *Brandeis* case, the employees grouped together had expressed a desire for such grouping (47 N. L. R. B. at 616). The Board's decision in that case does not stand for the proposition that in the absence of such an expressed desire the groups may not appropriately be separated. *Matter of The May Department Stores Co.*, 39 N. L. R. B. 471, upon which petitioner also relies (Br. 26), did not involve the question whether a unit of alteration workers would be appropriate if it failed to include those who work on women's clothing (39 N. L. R. B at 478).

[53] See Zaretz, C. E., *The Amalgamated Clothing Workers of America* (New York, 1934), pp. 54–68; Seidman, J., *The Needle Trades* (New York, 1942), pp. 79–89; Hardman, J. B. S. (ed.), *The Amalgamated Today and Tomorrow* (New York, 1939), pp. 89–90; Stowell, C. J., *The Journeymen Tailors Union of America—A Study in Trade Union Policy* (1918), pp. 82–128.

IV

THE BOARD PROPERLY CERTIFIED THE UNION AS EXCLUSIVE BARGAINING REPRESENTATIVE OF THE EMPLOYEES IN THE APPROPRIATE UNIT

Having received a majority of the votes cast in a Board-conducted election to determine the exclusive bargaining representative of petitioner's employees in an appropriate unit, the Union was properly certified by the Board. National Labor Relations Act, Section 9 (a), (c), Appendix A, *infra*, pp. ~~75–76~~ 76–77. The validity of the Board's certification is in no way rendered questionable by the fact that the authorization cards, upon the basis of which the Board determined that an interest in representation existed, ran to the United Department Store Employees Union, affiliated with the United Retail, Wholesale and Department Store Employees of America, C. I. O., the former being one of the locals affiliated with the Union, rather than to the Union. Cf. *National Labor Relations Board* v. *Franks Bros. Co.*, 137 F. 2d 989, 992 (C. C. A. 1), enforcing 44 N. L. R. B. 898, 910–911, affirmed, 321 U. S. 702; *Matter of A. Sartorius & Co., Inc.*, 40 N. L. R. B. 107, 120, enforced, *National Labor Relations Board* v. *A. Sartorius & Co., Inc.*, 140 F. 2d 203 (C. C. A. 2); *Matter of Northwestern Cabinet Co.*, 38 N. L. R. B. 357, 366–367; *National Labor Relations Board* v. *National Mineral Co.*, 134 F. 2d 424, 427 (C. C. A. 7), certiorari denied, 320

U. S. 753; see National Labor Relations Board, *Eighth Annual Report* (1944), p. 35. As the Board found, the Union represents its local affiliates in collective bargaining, and the employees were cognizant of this fact (R. 8, 90, 213). Cf. *Franks Bros.* case, *supra; Matter of A. Sartorius & Co., Inc., supra.* The Union was, therefore, eligible to file a petition for investigation and certification of representatives pursuant to Section 9 (c) of the Act.[54]

The showing of an interest in representation which the Board requires of the person or organization filing such a petition is merely an administrative requirement to advise the Board, as a preliminary matter, that there is sufficient justification for proceeding with the investigation of representatives.[55] The Board's administrative conclusion that a sufficient showing of interest in representation has been made to justify it in proceeding with the investigation of representatives is

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[54] Article III, Section 1 of the Board's Rules and Regulations (29 Code Fed. Reg. (Cum. Supp.) sec. 203.1), issued July 11, 1939, pursuant to section 6 of the Act provides that: "A petition to investigate and certify under section 9 (c) of the Act the name or names of representatives designated or selected for the purpose of collective bargaining may be filed by an employee or any person or labor organization acting on behalf of employees, or by an employer."

[55] *Matter of Buffalo Arms Corp.*, 57 N. L. R. B. 1560, 1561–1563; *Matter of The Beebe Corp.*, 59 N. L. R. B. 538; *Matter of Hillside Fluor Spar Mines*, 56 N. L. R. B. 664, 665; *Matter of Frigidaire Division, General Motors Corp.*, 54 N. L. R. B. 55, 56; *Matter of R. H. Siskin & Sons*, 41 N. L. R. B.

not subject to review. See *New York Handkerchief Mfg. Co.* v. *National Labor Relations Board*, 114 F. 2d 144, 148 (C. C. A. 7), certiorari denied, 311 U. S. 704; *National Labor Relations Board* v. *National Mineral Co.*, 134 F. 2d 424, 426, 427 (C. C. A. 7), certiorari denied, 320 U. S. 753; *Beebe Corp.* v. *Millis*, 58 F. Supp. 993, 994 (S. D. N. Y.). An employer has no right under the statute or otherwise to compel a union to prove a majority by a method other than a Board-ordered election, or, indeed, by any particular method. *National Labor Relations Board* v. *Chicago Apparatus Co.*, 116 F. 2d 753, 758–759 (C. C. A. 7); *National Labor Relations Board* v. *Moltrup Steel Products Co.*, 121 F. 2d 612, 618 (C. C. A. 3); *National Labor Relations Board* v. *New Era Die Co., Inc.*, 118 F. 2d 500, 504 (C. C. A. 3); *International Association of Machinists* v. *National Labor Relations Board*, 110 F. 2d 29, 38 (App. D. C.), affirmed, 311 U. S. 72.

Moreover, even if the Board were required to determine the petitioning union's interest in rep-

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187, 188–189; *Matter of H. G. Hill Stores*, 39 N. L. R. B. 874, 876; *Matter of Interlake Iron Corp.*, 38 N. L. R. B. 139, 142–143; *Ninth Annual Report* (1944), pp. 23–24; *Eighth Annual Report* (1944), p. 44; cf. *National Labor Relations Board* v. *National Mineral Co.*, 134 F. 2d 424, 426 (C. C. A. 7), certiorari denied, 320 U. S. 753 ("The investigation and election authorized in the aid thereof under Section 9 (c) of the Act are administrative proceedings"). See also *Inland Empire District Council* v. *Millis*, No. 613, October Term 1944, decided June 11, 1945, slip opinion, pp. 8–9.

resentation, such an interest was in fact present. In determining the representative status of a labor organization, the Board is not concerned with the "technicalities of the laws of agency" (*Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, 295), "not with any isolation of the scrivenistic niceties of the petition, but with a practical evaluation of the whole situation from the petition and the circumstances surrounding it, together with all the other facts in evidence, as a reasonable basis for deciding that the employees had in fact selected the Union as their representative." *National Labor Relations Board* v. *Fargo Foundry Co.*, 141 F. 2d 462, 465 (C. C. A. 8); *Lebanon Steel Foundry* v. *National Labor Relations Board*, 130 F. 2d 404, 407 (App. D. C.), certiorari denied, 317 U. S. 659. Even if the authorization cards failed to reflect the Union's interest in representation, the Board's decision to hold an election did not prejudice petitioner. If there were an irregularity, only an employee, certainly not petitioner, would have standing to complain. As the Circuit Court of Appeals for the Seventh Circuit has held (*National Labor Relations Board* v. *National Mineral Co.*, 134 F. 2d 424, 426–427, certiorari denied, 320 U. S. 753):

> It is the agent of the employees that is being chosen, and not the agent of the employer. The employees have raised no question as to the proceedings in which their representative was selected. One

would naturally expect the employer, unless prejudicially disposed towards unions, to be indifferent to the question of who is to be chosen to represent the employees. * * *

The employer's interest and his great concern about whom the employees shall have as their representative for bargaining purposes are easily demonstrated as very unsubstantial. Suppose the stockholders of the respondent company or any corporation were holding a stockholders' meeting for the purpose of electing the bargaining representative of the stockholders, namely, the directors; and suppose fraud, forgery and sharp dealing of many kinds were used in the procurement and handling of the stockholders' proxies in such an election. Would the employer be likely to tolerate the protest of its employees, who were not stockholders, that the election was crooked and invalid? In what forum in this land of ample legal machinery could the employees be heard to challenge the election of the stockholders' representative for collective bargaining? This reverse statement of the case shows how ephemeral and unsubstantial the employer's objection is. * * *

See also *Botany Worsted Mills,* 133 F. 2d 876, 882 (C. C. A. 3), certiorari denied, 319 U. S. 751; *National Labor Relations Board* v. *Whittier Mills Co.*, 111 F. 2d 474, 478 (C. C. A. 5). Cf. Hearings, S. Committee on Education and Labor, S. 1958, 74th Cong., 1st Sess., pp. 718–719, 877–879.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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OCTOBER 1945.

APPENDIX A

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

FINDINGS AND POLICY

SEC. 1. * * *

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

NATIONAL LABOR RELATIONS BOARD

* * * * *

SEC. 6. (a) The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe.

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting com-

merce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or

may be established by agreement, code, law, or otherwise.

* * * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such

transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

APPENDIX B

In its regulations entitled "Procedure in Cases of Voluntary Applications to National War Labor Board for Wage Adjustments by Private Employers", issued on November 6, 1942, the National War Labor Board made provision for joint application for wage adjustments arrived at through collective bargaining (4 War Lab. Rep. XXXI, XXXIII–XXXIV). Section III, 3, of the regulations covered the instant situation (where an employer applies on his own initiative for a wage adjustment) and clearly recognized the interest of the collective bargaining representative in such application:

> * * * shall be signed either (a) jointly by the employer and a duly recognized collective bargaining agency for any or all of the employees who are to be affected by the proposed wage adjustment, or (b) by the employer alone. In either case the application shall state whether or not there is a duly recognized collective bargaining agency (for any or all of the affected employees) which has not joined with the employer in the application. If it appears that there is such an organization which has not so joined, the office of the Wage and Hour Division, to which the application has been submitted, shall, as agent of the Board, before acting on the application, send to the appropriate local officials of such organization a notice of the application, requesting the organization, if it has any ob-

> jections to the application being acted upon, so to inform the office. If no such objections are filed within seven days of the sending of the notice, or if the organization in question states that it has no objections, the application will then be acted upon. If objections are made within said period, the matter will be treated as a dispute case and referred to the Conciliation Service of the Department of Labor.

This provision was incorporated in the War Labor Board regulations entitled "Jurisdiction and Procedure of Regional War Labor Boards," issued April 5, 1943, as Section IV, B, 3 thereof, (6 War Lab. Rep. IX, XII) and in the regulations bearing the same title issued by the War Labor Board on April 15, 1943, amended on October 1, 1943 (9 War Lab. Rep. XXXIII). On June 22, 1943, Lloyd K. Garrison, then Executive Director and General Counsel of the National War Labor Board, in a memorandum to the Regional War Labor Boards, explained that:

> The phrase "a duly recognized collective bargaining agent" as used in Section IV, B, 3 of "Jurisdiction and Procedure of Regional War Labor Boards" refers either to a labor organization which has actually been recognized by the employer for the purpose of collective bargaining or a labor organization which has been certified by the National Labor Relations Board or a similar state agency, where the legal result of certification is that the employer is obliged to bargain with the union. Where there is such a labor organization and it has not joined in the application, it is entitled to receive a copy of the application before the application is processed.

> Where a labor organization has not been "duly recognized or certified" it may not receive a copy of the application but upon inquiry it should be told whether or not an application has been filed.

This explanation was appended to the phrase "a duly recognized collective bargaining agency" as a footnote (9 War Lab. Rep. XXXIII) and was later incorporated into the text of the regulation. 8 Fed. Reg. 16676, 16678.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

MAY DEPARTMENT STORES COMPANY, Doing Business as FAMOUS-BARR COMPANY,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD.

No. 39.

PETITION FOR REHEARING.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

MAY DEPARTMENT STORES COMPANY, Doing Business as FAMOUS-BARR COMPANY, Petitioner,	}	No. 39.
vs.		
NATIONAL LABOR RELATIONS BOARD.		

PETITION FOR REHEARING.

To the Honorable the Justices of the Supreme Court of the United States:

Comes now The May Department Stores Company, doing business as Famous-Barr Company, Petitioner in the above entitled cause, and presents this its petition for a rehearing of said cause, pursuant to Rule 33 of this Court, and in support thereof Petitioner respectfully states:

1. "Appropriate Unit." The Court has overlooked the fact that all the evidence in the case shows that the unit was not claimed for the benefit of the employees in the unit, but for the advantage of one of the two unions carrying on rival organizing campaigns in a storewide unit in which both unions claimed substantial membership.

The Court has also overlooked the fact that the trade involved in this case is the alteration of clothing in a department store and that the evidence in the case and the Board's finding show that the skill required for the alteration of women's clothing is the same skill as that required for the alteration of men's clothing.

2. "Form of Ballot." This Court was in error in assuming that any of the employees, when signing a designation of Local 372 as representative, was aware of the affiliation of Local 372 with the St. Louis Joint Council. The Joint Council had not been designated by any of the employees, but its name was placed on the ballot by the Board as the only labor organization on the ballot.

In view of the Board's well-known policy of refusing to order an election unless the petitioning union has been designated by a minimum of approximately thirty per cent of the employees in the proposed unit, the Board's action amounted to material misrepresentation affecting the result of the election.

The Act gives the employer the right to object to arbitrary and capricious action of the Board not only as to the composition of the unit but also as to any action affecting the result of the election.

3. "Action on Wages." The opinion of the Court effectively destroys the right given by the Act to judicial review of a certification. The opinion also gives to a union, which has been certified as the representative of only a small number of employees, veto power over the acts of the employer with respect to all its employees.

4. "Breadth of Order." The language which the Court added to paragraph 1 (a) of the Board's order lacks specificity and the order remains too broad in any event.

Petitioner submits herewith suggestions in support of this petition; setting forth citations to the record and to

the authorities and discussing briefly the foregoing grounds of the petition.

Wherefore, it is respectfully urged that this Petition for Rehearing be granted and that, upon further consideration, the Decree of the United States Circuit Court of Appeals for the Eighth Circuit be reversed.

Respectfully submitted,

MILTON H. TUCKER,
ROBERT T. BURCH,
Attorneys for Petitioner.

Certificate of Counsel.

Milton H. Tucker and Robert T. Burch, Attorneys for the above named petitioner, hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

Milton H. Tucker,
Robert T. Burch.

SUGGESTIONS IN SUPPORT OF PETITION FOR REHEARING.

In support of the foregoing Petition for Rehearing, Petitioner respectfully submits the following suggestions:

I.

"APPROPRIATE UNIT."

The Court has overlooked the fact that all the evidence in the case shows that the unit was not claimed for the benefit of the employees in the unit, but for the advantage of one of the two unions carrying on rival organizing campaigns in a store-wide unit in which both unions claimed substantial membership.

The record in this case makes it clear that the attainment of collective bargaining rights for the employees of the two small departments involved in this case was purely incidental to the store-wide organizing strategy of the Master Committee for the whole store. There is nothing to indicate that the employees in these two departments were consulted as to whether they wished to be represented by the Joint Council; or were consulted when the store-wide Master Committee made the decision by which these departments were first to be represented by Local 372 as part of a store-wide unit (Intervener's Ex. 17, R. 169); or were consulted when the Master Committee decided to petition for a unit of only the bushelmen in the name of the Joint Council (R. 96, 97). The witness, Verderber, testified that all the employees in departments 280 and 281 signed up about the same time and that he signed up in September, 1942 (R. 96). Board's Exhibit 3 (R. 156) shows that the cards on which the showing of representation was based were all signed late in September and early in October, 1942. So that the same cards

were used when Local 372 petitioned for a store-wide election in November 1942 and then when that petition was unsuccessful the Joint Council submitted the same cards in support of its petition for representation of departments 280 and 281. There is no evidence that the employees in the busheling departments ever authorized this action, or knew that it was going to take place, for according to Verderber's own testimony he did not know how the petition happened to be filed by the Joint Council even though he was the steward of the busheling departments and a member of the Master Committee (R. 94, 95).

It is obvious that the formation of this unit and the use of the Joint Council as a fictional representative without the knowledge of the employees are tied together and demonstrate the lack of good faith in the designation of the unit. The unit was designated in the petition for certification by the Joint Council filed in the interest of the store-wide organization campaign and not in the interest of or with the consent and knowledge of the busheling department employees.

While the Board has large discretion in the selection of units in order to afford collective bargaining to the employees who have indicated a desire for it and in the group in which they desire to be represented, this process should not be perverted to further the organizing campaign of one union in disregard of the desires of the members in the departments involved.

The Union stated plainly that this was the first of a series of election petitions and that others would follow shortly and that its plan to divide the store into small units did not conflict with its store-wide organizing campaign, but "We believe this new approach may do the job faster" (Intervener's Ex. 11, R. 163). It also stated:

"Where we will petition next depends upon only

one thing. That is which group is ready next" (Intervener's Ex. 12, R. 166).

Nothing in the Court's reasoning nor in the authorities mentioned furnishes any justification for the Board's arbitrary action in this case. Certainly, the case of **N. L. R. B. v. Hearst Publications**, 322 U. S. 111, 134, mentioned by the Court, does not support the Board's action in dividing a department store into small units at the request of one of two rival unions, each conducting store-wide organizing campaigns, where the union on whose petition the small unit is established has stated publicly its reason for desiring the small unit is merely to outdistance the other union in the store-wide unit.

The opinion of the Court states:

> "We think that there was ample testimony to support the Board's conclusion that the employees of the two busheling rooms were an appropriate unit, since these employees had a degree of self-organization and **a special trade which sufficiently differentiated them from other employees.**" (Emphasis supplied.)

The Court has overlooked the fact that the trade involved here is the alteration of clothes in a department store, and that the evidence in the case and the Board's finding show that the skill required for the alteration of women's clothing is the same skill as that required for the alteration of men's clothing.

Whatever may be said to the effect that those who work on men's clothing, "speaking generally," belong in large numbers to the Amalgamated Clothing Workers and those who work on women's clothing belong in large numbers to the International Ladies Garment Workers Union, that division in the field of organization applies to the manufacturing industry (R. 225, 226, 231) and not to alteration departments in retail stores (R. 104, 160, 168; 47 N. L. R. B.

614). The Union involved in this case is neither the Amalgamated nor the International Ladies Garment Workers, and the industry involved in this case is not the industry in which those unions function. The record in this case shows that the employees in Departments 280 and 281 did not have a special trade which differentiated them from the employees in other departments engaged in the alteration of women's clothing (R. 132; 133).

We submit that the determination of the unit in this case was arbitrary, unreasonable and capricious.

II.

"FORM OF BALLOT."

This Court was in error in assuming that any of the employees, when signing a designation of Local 372 as representative, was aware of the affiliation of Local 372 with the St. Louis Joint Council. The Joint Council had not been designated by any of the employees, but its name was placed on the ballot by the Board as the only labor organization on the ballot.

In view of the Board's well-known policy of refusing to order an election unless the petitioning union has been designated by a minimum of approximately thirty per cent of the employees in the proposed unit, the Board's action amounted to material misrepresentation affecting the result of the election.

The opinion of the Court on this point leaves it uncertain whether the Court denied Petitioner's contention (a) because it did not believe that the placing of the Joint Council on the ballot was improper and might have been confusing, or (b) because Petitioner failed to prove the extent of confusion of the voters resulting from the action of the Board, or (c) because the Court felt that regardless of the extent to which the confusion may have existed in

the minds of the voters, or the resultant effect on the outcome of the election, the question may not be raised by the employer.

In any case we believe that the decision of the Court on this point is due both to a misunderstanding of the facts and to our failure to point out the important distinction between the situation in **N. L. R. B. v. Franks Bros. Co.**, 137 F. (2d) 989, 992, and the present case.

(a) The Court's misapprehension as to the facts.

We believe that it is important to point out that there is nothing whatever in the record in the present case to justify the inference that a single one of the employees either knew, or had any reasonable grounds to believe, when he signed a card in September 1942 designating Local 372 as his representative, that he was thereby authorizing a **more inclusive** organization to represent him. There was **no** finding by the Board (nor was there any basis for finding) that **any** of the employees knew that they were becoming affiliated with the Joint Council.

The only findings in the Intermediate Report as to the St. Louis Joint Council are as follows:

> "St. Louis Joint Council, United Retail, Wholesale & Department Store Employees of America is a labor organization affiliated with the Congress of Industrial Organizations. The Joint Council represents in St. Louis various locals of United Retail, Wholesale & Department Store Employees of America which admit to membership employees of the respondent" (R. 49).

Aside from affirming the rulings of the Trial Examiner and adopting his findings, conclusions and recommendations (R. 45), the Board made no specific finding as to the Joint Council in its Decision and Order.

The following is the only relevant statement by the Circuit Court of Appeals on the subject:

> "At **that** time the evidence **tends** to show that the employees **understood** that the joint Council represented them. But the respondent argues that they signed cards designating Local 372 as their representative. Frank Verderber, a member of the master committee of Local 372, **testified that at the time he signed the card he knew that Local 372 was a part of the Joint Council.** When asked on cross-examination the question, 'Have you ever authorized the St. Louis Local Joint Council to represent you?' he answered, 'I think that takes care of it automatically, when I signed that first card.' His testimony on this point is **corroborated by other testimony**; and there is no contradictory testimony in the record" (R. 267). (Emphasis supplied.)

It will be noted that the Circuit Court found that "at **that** time the evidence **tends** to show that the employees **understood** that the Joint Council represented them." The "time" referred to was the time of the filing of the petition. The only employee who was chosen to testify on the subject was Verderber, who was a member of the Master Committee which was organizing the whole store (R. 88, 89, 95), and who was therefore presumably the best informed of all the employees; and there is absolutely nothing to indicate that any of the other employees had any information on the subject whatsoever. The only evidence relied on by the Court as tending to show the employees' understanding was that of Verderber, as to whom the Court found

> "**that at the time he signed the card** he knew that Local 372 was a part of the Joint Council."

Not only was there no testimony to that effect, but the only testimony was directly to the contrary. The specific

testimony of Verderber on which the Circuit Court of Appeals relied for its statement that Verderber testified that at the time he signed the card designating Local 372 (which was in September 1942, R. 77), he knew that Local 372 was a part of the Joint Council, is his testimony that

> "I think that takes care of it automatically, when I signed that first card" (R. 267).

But Verderber could not possibly have thought in September 1942, when he signed the card authorizing Local 372 to represent him, that he was thereby authorizing the St. Louis Joint Council to represent him, because he did not learn that there was any affiliation until six months later. As he testified, he found out that Local 372 was affiliated with the St. Louis Joint Council only about a month before the hearing (R. 101), which began on May 7, 1943 (R. 7).

Certainly if Verderber, who was by all odds in a position to be the best informed employee in departments 280 and 281, and who was the only witness relied on by the Court, did not know when he signed a card designating Local 372 to represent him that he was thereby authorizing the Joint Council to represent him, it cannot be assumed that any of the others knew it at the time they signed their cards in September 1942; nor is there any evidence that they ever learned it later.

Perhaps the **Board** might have ignored the fact that no other employee but Verderber testified on this subject and have drawn an inference as to what the **other** employees understood; and perhaps (although this is very doubtful) the **Board** might have ignored Verderber's testimony that he never signed a card authorizing the St. Louis Joint Council to represent him (R. 89) and never designated the St. Louis Joint Council to represent him (R. 90), and that

he knew of no employees who had signed such cards (R. 90) and **that he didn't know how it happened that the Joint Council filed the petition for certification** (on which this case depends) for the bushelmen (R. 94, 95), and might have relied entirely upon the evasive and unresponsive statement in response to the question, "Have you ever authorized the St. Louis Local Joint Council to represent you?":

> **"A. I think that takes care of it automatically, when I signed that first card."**

But we do not believe that the Circuit Court of Appeals had the authority to draw any such inference or make any such findings based on such flimsy evidence, particularly when the witness had just testified in answer to a question by the Trial Examiner that **he had never designated the Joint Council to represent him** (R. 90). It would have been questionable enough whether the Court of Appeals could have sustained such a finding, had it been made by the Board. But in view of the Board's failure to go so far, we do not believe that the Court could do so.

And the finding by the Circuit Court of Appeals that this testimony was corroborated by other testimony (R. 267) is completely without foundation.

But, it would seem that this Court likewise assumed (contrary to the fact) that the employees in the busheling rooms knew, or had reason to believe, that in signing a card in September 1942 applying for membership in Local 372, they had automatically designated the St. Louis Joint Council to represent them. This Court indicates as much by stating:

> **"The Board pointed out in its finding of facts on the petition for an election that the Joint Council represented this Local and similar Locals in other stores."**

There is no doubt that the record shows something of an indefinite relationship between Local 372 and the Joint Council. But the real question is whether the employees knew of this affiliation.

This Court implies by its citation of the case of **N. L. R. B. v. Franks Brothers Co.**, 137 F. (2d) 989, 992, that it does not distinguish between the Franks case in which it was held that the designation of a parent includes the designation of a subsidiary, and the present case in which the result can be justified only upon the theory that the designation of a subsidiary automatically designates a parent union holding company of which the employees had no knowledge when making the designation.

Furthermore, in the Franks case, where the employees had signed two different forms of membership cards, the **Board** found specific knowledge at the time of signing the applications, as follows:

> "It is clear that employees signing either type of membership card **were aware** that they were applying for membership in the Union."
>
> (44 N. L. R. B. 898, 910.)

There was no such finding by the Board in the present case—and no basis for any such finding by the Circuit Court of Appeals.

It is understandable that an employee in signing a card designating an International, would expect, to be represented by a constituent Local; not only does the greater include the lesser, but that is the normal procedure in labor union organization. However, in the present case it does not follow that the designation of a **Local** authorizes a **Joint Council** to represent the employee, where the employee had no knowledge of the relationship between the Local and the Joint Council at the time of the desig-

nation, and certainly no reason to assume that any such blanket authorization was being given. The lesser certainly does not include the greater and there is no custom under which the designation of a local union includes any organization with which the Local may be, or become, affiliated. Certainly an employee who has designated a Local Union as his representative would expect to have some voice in his designated agent and he should not be held to have selected a larger agency, of which his own Union was only one of several constituent organizations, in the absence of either express or clearly implied intention. Therefore, the Franks case and others of that type which deal with a converse situation are not authority.

We believe that the foregoing should demonstrate that there was no basis in fact or law for the assumption made by the Circuit Court of Appeals that the employees in the busheling departments understood when they signed an authorization card for Local 372 that they were authorizing a holding company of Local Unions (the Joint Council) to represent them; especially, since as Verderber testified, he did not know how it came about that the Joint Council filed the petition for representation in this case (R. 94, 5). And yet such knowledge is indispensable to the validity of the result in this case, as shown by the Franks case and by the assumptions made by the Circuit Court of Appeals in this case. Even the Board's Brief (p. 70) argues that "the employees were cognizant of this fact."

(b) The possibility of confusion.

The next question is whether or not it is necessary for the Petitioner to show that there was actual confusion in the minds of the employees resulting from the error of the Board, and whether the probability of such confusion is sufficient to invalidate the certification.

Certainly the Board's action in placing the Joint Council on the ballot, in view of its well established practice, was equivalent to a representation that approximately 30% of the employees had already designated the Joint Council.

We feel that it is only reasonable to assume as a matter of common experience that an employee would be more likely to vote for the Joint Council if he thought that a substantial number of his fellow employees had signed cards designating it as their choice, than if he knew that **none** of them had done so. Admittedly, there is no means to measure the extent to which any individual employee would be so influenced, or the number of employees who were so influenced.

It is conceded that the Board may not be arbitrary or capricious in its action, even in a representation case; and we think it should be equally clear that the Board may not, innocently or otherwise, take any action which **might** influence the result of an election.

This is in line with the Board's own announced policy as set forth by the Board at page 51, Chapter V, of the **Eighth Annual Report of the National Labor Relations Board**, as follows:

> "The Board seeks to conduct elections under circumstances which will insure that the employees express their free and independent choice of representatives. The integrity of the Board's election machinery has been universally recognized."

This certainly implies that the Board's election machinery will not be used to influence in any possible way the result of the election.

The Board also says in the same annual report, at page 52:

> "The Board has also set aside an election where

one of the labor organizations involved distributed sample ballots bearing the name of the Regional Director, thereby giving rise to the erroneous impression that the Board was lending its support to one of the contestants."

As the Board said in the case of **Sears, Roebuck & Co., 47 N. L. R. B. 291**, l. c. 293:

> "In order to maintain the integrity of secret ballot elections conducted by the Board, it is necessary that employees be not misled by any action, innocent or otherwise, into believing that the Board favors one labor organization over another. It is clear and we find that employees **may** have received the erroneous impression, from the marked sample ballots distributed by the C. I. O. bearing the name of the Regional Director, that the Board was lending its support to one of the contestants in the election."

The Board set aside that election because of the mere possibility that one or more voters may have thought that the Board favored one Union over another.

In the case before the Court, it is much more likely that the employees were influenced by the action of the Board in placing on the ballot as the only candidate the name of an organization which not one employee had designated, in view of the Board's usual policy of not holding an election unless a substantial number of employees have been found to have previously designated the party on the ballot.

In the matter of **Certain-teed Products Corporation and Order of Railway Conductors**, 49 N. L. R. B. 360, the Board set aside an election because the official ballot designated the Union as "Brotherhood of Railway Trainmen" instead of "Brotherhood of Railroad Trainmen." The Board said that

"Since employees **may have been misled** by this variance we shall vacate and set aside the election."

Among the many other pronouncements of the Board that it should avoid the mere possibility that some of the employees may have been misled is the following:

"Similarly, the Board will not place upon the ballot the name of a Union which has no members or only a very few members, relatively, among the employees in an appropriate unit (Matter of Southern California Gas Company, 10 N. L. R. B. 1123)." Fourth Annual Report of the N. L. R. B., page 79.

In the matter of **Douglas Aircraft Company**, 51 N. L. R. B. 161, the Union withdrew from the A. F. of L. However, due to an error, the letters "A. F. L." were printed on the sample ballot although they were not on the official ballot. The Board ordered a new election to be held, stating that the voters may have been misled by such letters on the **sample** ballot.

Also see the case of **Dedeman Foundry & Machine Company**, 52 N. L. R. B. No. 104.

This is not a case where the Board merely waived its own rule that it will not ordinarily order an election unless the petitioning union shows that it represents a minimum of approximately 30% of the employees in the appropriate unit. This is in fact a case where the evidence shows that the Board placed on the ballot as the **only** candidate a Union which had not been designated as the representative of a **single** employee. Who can say that some of the employees were not influenced by the Board's representation to each employee that a substantial number of his fellow employees had already designated the St. Louis Joint Council as their representative? The burden is not on the Petitioner to show the result of such influence, but only that the influence was present.

(c) Company's right to object.

The only remaining question is whether or not the Company is in a position to question a certification which has resulted from the improper action of the Board in influencing the result of the election, under such circumstances that if the conduct of the Board had been attributable to the Union or the Company, it would have, under the Board's own procedure, been sufficient to cause the election to be set aside. This question was raised during the oral argument and it may be implied in the language of the opinion of the Court—"In the circumstances of this election, we see no basis for the Company's objection to the certified representative on the ground of possible confusion of the employees."

We cannot believe that Congress intended that the Board should be able to influence the result of an election and to defend such action on the ground that this is no concern of the employer. We cannot believe that the Board will not be held to the same standards in its conduct as it requires of the Unions participating in an election. Nor can we believe that under the Act, which gives the employer the right to object to a unit that has been selected by the Board according to arbitrary standards (even though a majority of the employees in the unit may have voted for representation by a particular Union), the employer, who by law is required to deal with the certified representative, may not object and obtain review where the certification has been the result of express or implied misrepresentation, intentional or unintentional, on the part of the Board.

III.

"ACTION ON WAGES."

The opinion of the Court effectively destroys the right given by the Act to judicial review of a certification. The opinion also gives to a union, which has been certified as the representative of only a small number of employees, veto power over the acts of the employer with respect to all its employees.

The Court in its Opinion, after stating that collective bargaining by an employer with any one except the duly recognized or accredited representative of the employees violates Section 8 (1) of the Act, states:

> "Employer action to bring about changes in wage scales without consultation and negotiation with the certified representative of its employees cannot, we think, logically or realistically, be distinguished from bargaining with individuals or minorities."

We submit that by so holding the Court has effectively destroyed the right granted by Congress in Sections 9 (d) and 10 (e) and (f) of the National Labor Relations Act, whereby an employer may have judicial review of a certification issued by the Board under Section 9 (c) of the Act. Although the opinion of the Court mentioned only "changes in wage scales", there is no basis for any distinction between such changes and changes in hours or other conditions of employment, for Section 9 (a) of the Act provides that representatives chosen under the Act shall be the exclusive representative of all the employees in the unit "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."

It follows, therefore, from the Court's language quoted above that in any case where the Board certifies a union

as the representative of any unit, no matter how small, in an employer's business, the employer may not exercise the right to have judicial review granted by Congress, if he finds it necessary or desirable, pending the ultimate decision of such review, to make any changes in wages, hours or other conditions of employment affecting all his employees. Under such circumstances, the establishment of a store-wide or even a system-wide pension plan, the granting of sick leave, closing the business on such an occasion as V-J Day without loss of pay to the employees, the payment of a Christmas bonus, or any other change in wages, hours or working conditions, would forfeit the employer's right to have judicial review of the certification, because any such action would compel the employer to bargain with the certified union as representative of some small number of the employees in the business and thus remove the only means by which the employer could under the Act secure such judicial review.

It is apparent from the Court's Opinion that no such destruction of a Congressionally granted right was intended by the Court, for the Opinion contains a suggested procedure by which it is said the employer could make changes in wages without violating the Act and with reservation of the Company's legal right to challenge the certification of the bargaining agent. In making such suggestion, however, the Court has overlooked the conflict inherent therein. The Court's suggestion is that the employer should bargain with the certified representative "with reservation of the company's legal right to challenge the certification of the bargaining agent when any complaint might be filed for refusal to bargain collectively." The conflict seems clear. Applied to this case the suggestion seems to be that the Petitioner could have bargained with the Joint Council while reserving its right to challenge the certification of the Joint Council, if the

Joint Council should charge that the Petitioner refused to bargain. Assuming that such a reservation were possible and that the Petitioner by recognizing and bargaining with the Joint Council would not forfeit its right to challenge the certification of the Joint Council, does it not follow that the suggested procedure set forth in the opinion of the Court would merely postpone the day when the Petitioner would be required to choose between the normal operation of its business and the surrender of the right to judicial review granted by Congress? The Court's suggested procedure means clearly that the employer may not avail itself of the right to judicial review while operating its business and making the necessary operating changes under the constantly fluctuating conditions of business.

In the case of **American Federation of Labor v. National Labor Relations Board**, 308 U. S. 401, 409, this Court said of the National Labor Relations Act,

> "The statute on its face thus indicates a purpose to limit the review afforded by Section 10 to orders of the board prohibiting unfair labor practices, a purpose and a construction which its legislative history confirms."

In that case this Court said also:

> "And in considering the provisions of Section 9 (d) the committee reports were emphatic in their declaration that the provisions of the bill for court review did not extend to proceedings under Section 9 except as incidental to review of an order restraining an unfair labor practice under Section 10. The bill was similarly explained on the Senate floor by the committee chairman who declared: 'It provides for review in the courts only after the election has been held and the board has ordered the employer to do something predicated upon the results of an election.' 79 Cong. Rec. 7658."

The employer's right to judicial review accrues only when he refuses to bargain with the certified union. It seems clear, therefore, that the employer cannot preserve that right and at the same time bargain with the certified union on every change in wages, hours and working conditions which may be necessary for the operation of the business. The conflict is magnified in a case such as this where the union has been certified as the representative of only 30 to 40 employees out of approximately 5,000 employees in the employer's establishment. As stated in the minority opinion in this case:

> "Had it recognized the union, by seeking its permission to include the affected employees, there would have been no factual or legal basis for the only proceedings by which review was assured; and, in order to secure it, the company then would have been forced to commit some other act of unfair practice or to take its chance upon some other doubtful remedy. In either event, it would have been confronted with its prior action of dealing with the union and the possibilities this would present either for applying the broad doctrine of estoppel or for occupying the inconsistent, not to say indefensible, position of having recognized the union and then having deliberately repudiated the recognition."

It seems clear, therefore, that the employer cannot bargain with a certified union and at the same time obtain judicial review of the certification. The right to judicial review is given by the Act, but the right can be exercised only by refusing to bargain. It follows therefore that the opinion of the Court effectively destroys the right of review given by the Act.

The only reason mentioned in the opinion of the Court for denying the right of review granted by Congress is the following:

> "By going ahead with wage adjustments without negotiation with the bargaining agent, it took a step which justified the conclusion of the Board as to the violation of Section 8 (1). Such unilaterial action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent. If successful in securing approval for the proposed increase of wages, it might well, as the Board points out, block the bargaining representative in securing further wage adjustments."

We submit that this reasoning does not justify the Court's denial of a right given by the Act. The wage increase proposed in this case was not such an increase as would or might "minimize the influence of organized bargaining." It was not such as would or might emphasize to the employees "that there is no necessity for a collective bargaining agent." It was an increase proposed under the regulations of the National War Labor Board to correct substandards of living (Board's Ex. 9, R. 196A, 196B). There was no question of bargaining involved and the proposed action could not possibly minimize the influence of organized bargaining. The action was not limited to the 30 or 40 employees which the Joint Council claimed to represent, but it was store-wide. The Union could not have been deprived of any credit to which it was entitled, for it did not claim to represent the 4500 other employees involved, and it certainly could not claim credit for the determination by the National War Labor Board of **rates necessary to eliminate substandards of living.** The Union had no more right to claim credit for the proposed action than for the operation of the store. Before it can be said that the Union was deprived of any credit it must first be found that it was entitled to credit, and such a finding was impossible in this case.

The speculation that the proposed increase might block the Union from securing further increases is not based on any evidence in the case and is wholly without foundation. Board's counsel in oral argument departed from the record to state that the National War Labor Board would not entertain an application for approval of a second increase for the same employees. If we were permitted to go outside the record it would be a very simple matter to show how misinformed Board's counsel is. We believe surely the Court did not base its decision upon counsel's erroneous statement. Certainly it would not be reasonable to believe that the National War Labor Board would refuse approval of an otherwise approvable increase because it had previously approved the elimination of substandards of living.

We submit that the Court's Opinion as to the proposed wage increase effectively destroys the right to a judicial review of a certification and that there is nothing in this case which justifies the Court's denial of the right given by the Act.

IV.

"BREADTH OF ORDER."

The language which the Court added to paragraph 1 (a) of the Board's order lacks specificity and the order remains too broad in any event.

The opinion of the Court quotes with approval from the case of **National Labor Relations Board v. Express Publishing Company**, 312 U. S. 426, 437, the following:

> "To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past."

The Court then held that the decree should not enjoin Petitioner generally, since its actions have not been determined by the Board to have been motivated by an attitude of opposition to the purposes of the Act. Under such circumstances we submit that the decree should not, in any event, be broader than that ordered by the Court in the **Express Publishing Company** case, where the company was enjoined from "any other acts in any manner interfering with the representative's efforts to negotiate." The Court here has added the words "or represent the above named employees as bargaining agent." The added words are so broad that the employer must be in constant doubt as to what is required of it. Any action taken by the employer which affects all its employees may be claimed by the Union and by the Board to be interference with the Joint Council's representation of the 30 employees. We submit that under the Court's opinion and under the facts of this case the decree should not in any event be broader than that ordered by the Court in the **Express Publishing Company** case.

CONCLUSION.

We know, of course, that careful consideration has been given this case by the Court, but we believe that the opinion of the Court shows in the respects pointed out above that the Court has overlooked material matters of law and fact and that the case should be reconsidered. We ask respectfully that Petitioner's petition for a rehearing be granted and that upon reconsideration the Decree of the Court below be reversed and the Court below directed to enter an order denying enforcement of the Board's Order.

Respectfully submitted,

MILTON R. TUCKER,
ROBERT T. BURCH,
Attorneys for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

No. 39.—October Term, 1945.

May Department Stores Company, doing business as Famous-Barr Company, Petitioner, *vs.* National Labor Relations Board.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[December 10, 1945.]

Mr. Justice Reed delivered the opinion of the Court.

This writ of certiorari brings here for review the decree of the Circuit Court of Appeals enforcing an order of the National Labor Relations Board which was entered after the Board found upon hearings that petitioner had violated Sections 8(1) and 8(5) of the National Labor Relations Act.[1] The petition for the writ presented issues (1) as to whether two small related departments with thirty to forty employees may be an appropriate bargaining unit when the department store of which they are a part has around three hundred and fifty departments and approximately five thousand employees; (2) as to whether the Board could properly place the name of a Joint Labor Council on the ballot for the employees' bargaining representative when none of the employees were members of the Council but only of a local union which was associated with others in the Council; (3) as to whether seeking authority by the employer from the National War Labor Board to increase wages without taking up the increase with a certified bargaining agent may be an unfair labor practice under Sec-

[1] 49 Stat. 452-53. "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

"Sec. 8. It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

. . . . . .

"(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."

Opinion of the C. C. A., National Labor Relations Board *v.* May Dept. Stores Co., 146 F. 2d 66; determination of National Labor Relations Board, 53 N. L. R. B. 1366.

tion 8(1) of the Labor Act; and (4) as to the propriety of a Board order to cease and desist generally from unfair labor practices instead of an order to cease and desist only from the type or types of unfair practices which the Board found the employer committed. As these issues presented important problems in the administration of the National Labor Relations Act, certiorari was granted. 324 U. S. 838.

Appropriate Unit. After a hearing in which the employer, the petitioner here, the May Department Stores Company, doing business as Famous-Barr Company, a St. Louis department store, took part, the Labor Relations Board, on June 16, 1943, found that all non-supervisory employees of the Company, then 28 in number, working in the main and basement men's bushéling rooms constituted an appropriate unit for collective bargaining within the meaning of Section 9(b)[2] of the Labor Relations Act. An election was ordered. It resulted in the choice and designation of the St. Louis Joint Council, United Retail, Wholesale & Department Store Employees of America, C.I.O., as the representative for collective bargaining of the employees of the unit.

The Company contended that a store-wide unit of its five thousand employees was the most appropriate and at any rate that employees in the women's alteration and the fur alteration departments should be added to the employees in the men's bushéling rooms to form the unit. As there is no provision for direct review of the determination and certification of the bargaining representative, the Company, in order to secure judicial review of the finding as to the unit, awaited this proceeding which sought a decree directing it to bargain collectively with the representative. See *Inland Empire Dist. Council, etc.* v. *Millis*, 325 U. S. —.

A few months before this proceeding a determination that all employees of the Company subject to stated exceptions were the appropriate unit for collective bargaining had been sought by the C.I.O. The Company objected because no sufficient showing of representation was made and because it took exception to the exclusion of certain employees from the proposed unit. This petition was dismissed for failure of the C.I.O. to make a substantial showing

2 49 Stat. 453, Sec. 9. "(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

of membership in the suggested store-wide unit. 46 N. L. R. B. 305. That prior application is not a bar to this. The Board was careful to note in this proceeding that a larger unit might be fixed as appropriate if self-organization developed. Other departments of the store had members of this and other unions as employees. This presence of union members throughout the enterprise was a matter of consideration in deciding upon the appropriate unit but was not decisive. Compare *Pittsburgh Plate Glass Co.* v. *Board*, 313 U. S. 146, 156. No labor organization claimed to represent the entire body of employees. Therefore the Board determined to approve this unit as appropriate so that collective bargaining might start for these employees without waiting until more employees might be organized into a larger unit. Compare *Board* v. *Hearst Publications*, 322 U. S. 111, 134.

Under Section 9(b) the Board is delegated the authority to determine the unit. The judicial review afforded is not for the purpose of weighing the evidence upon which the Board acted and perhaps to overrule the exercise of its discretion but to "guarantee against arbitrary action by the Board."[3] The Board had before it the business of the company, the numbers of employees, the treatment of all employees as a unit by management with reference to sick leave, hospitalization, employee privileges, vacations, et cetera. Evidence was presented that a large proportion of employees in the proposed unit were members of the same union. It had testimony as to similarity and dissimilarity in tailoring and altering between the men's and women's alteration rooms. There was evidence that those who work on men's clothing, speaking generally, belong to a different union organization than those who work on women's clothes. The Board considered the interchange of workers between the two groups. We think that there was ample testimony to support the Board's conclusion that the employees of the two busheling rooms were an appropriate unit, since these employees had a degree of self-organization and a special trade which sufficiently differentiated them from other employees.

Form of Ballot. Petitioner objects to the certification because the ballot contained the name of the St. Louis Joint Council, United Retail, Wholesale & Department Store Employees, as a candidate for bargaining representative from the unit. This was

[3] S. Rep. No. 573, 74th Cong., 1st Sess., p. 14.

the organization which was certified. It had filed the petition for determination of the representative. The Council claimed that more than 51% of the employees in the suggested unit had designated it as their collective bargaining representative. The Board directs what names go on the ballot. Unless there is a showing of a substantial number of employees in the proposed unit who have become members of and selected the petitioner as their bargaining representative, the Board does not ordinarily order an election.[4] This is an administrative policy of the Board. In this case on the Joint Council's petition for certification, the Board found that the Council had a majority of the employees. As a matter of fact it was a local union which the employees had selected and joined. The Board pointed out in its finding of facts on the petition for an election that the Joint Council represented this local and similar locals in other stores.

The Company says that some employees may have been misled by the ballot into thinking that the Joint Council had a substantial number of the unit's employees as members because elections are not ordinarily called unless that situation exists. The local was represented by the Joint Council. Cf. *National Labor Relations Board* v. *Franks Bros. Co.*, 137 F. 2d 989, 992, affirmed on other grounds *Franks Bros. Co.* v. *Labor Board*, 321 U. S. 702. The Joint Council was chosen by a majority of the employees of the unit and certified. In the circumstances of this election, we see no basis for the Company's objection to the certified representative on the ground of possible confusion of the employees.

Action on Wages. The Board found that the Company interfered with, restrained and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act, under the circumstances herein detailed, in seeking the necessary approval (56 Stat. 765; Executive Order 9250, 7 Fed. Reg. 7871) on August 30, 1943, of the National War Labor Board for an upward wage adjustment for a large proportion of its employees, including the employees of the unit here involved, without bargaining collectively on the subject of the wages with the certified union. A letter accompanied the request to the War Labor Board which explained that

4 In the Matter of Houston Shipbuilding Corporation, 41 N. L. R. B. 638; In the Matter of American Manufacturing Company, 41 N. L. R. B. 995.

certain craft employees, not here involved, were excluded from the application for authority to increase wages because they were covered by collective bargaining agreements. The letter went on to say:

> "The St. Louis Joint Council, United Retail, Wholesale and Department Store Employees of America, C.I.O., . . . has been certified by the National Labor Relations Board, but we do not regard this as an appropriate unit and have consistently taken that position and have so notified all parties concerned. It is our intention to submit that question to the Courts, if and when the occasion arises. We have not recognized this Union and have not bargained with it for the employees in Departments 280 or 281 and no negotiations with that Union are pending. It is intended, however, that the employees in Departments 280 and 281 shall be included in this application.
>
> "We do not believe that any of the organizations named in the application, nor the organization named above, have any interest whatever in the enclosed application. However, if the organization named above should object to the inclusion of the employees of Departments 280 and 281 in the application, you are advised that said application may be considered as having been amended so as to exclude those employees from the application."

The next morning the employees were told over the store address system of the application for a wage increase for all employees, except higher paid executives and those employees "whose salaries have been fixed by closed shop agreements." A short time later another reference to the application was made over the address system. A similar announcement appeared in the September 3 issue of the store paper. The conditional offer to exclude the employees of the unit was not referred to in the announcements. Upon these facts the Board found a violation of Section 8(1).

The Company urges that its request for authority, without negotiation with the certified union as to the application to the War Labor Board, was not an unfair practice under Section 8(1) but only a necessary result of its position on non-recognition of the certified representative because the Company did not agree with the Board's determination of the appropriate unit for the selection of representatives. The Company says it could not give recognition to the certified agent and maintain this position.

We have in a preceding division of this opinion stated our conclusion that the Joint Council was a properly certified bargaining representative. Therefore at the time of the request to the War

Labor Board for authority to increase wages, the Joint Council must be considered as a properly certified bargaining agent. Company action in regard to it must be judged in that light even though its attitude toward the certification made its choice difficult.

The Joint Council was certified on July 12, 1943. After the election, the Council had requested a conference with the Company for negotiating a contract to cover wages, hours and working conditions. This request was declined on July 19th with the statement that the Company did not agree with the decision of the Board and desired to preserve its full rights to question the result as it "may see fit." The application to the War Labor Board followed on August 30th.

It is settled law that the Labor Relations Act makes it an employer's duty to bargain collectively only with the duly recognized or accredited representative of the employees. Disregard of this duty violates Section 8(1) of the Act. Section 9(a). *Medo Corp.* v. *Labor Board*, 321 U. S. 678, 683-84. Any other conclusion would infringe an essential principle of collective bargaining. See *J. I. Case Co.* v. *Labor Board*, 321 U. S. 332, 338. Employer action to bring about changes in wage scales without consultation and negotiation with the certified representative of its employees cannot, we think logically or realistically, be distinguished from bargaining with individuals or minorities. The fact that the application to the War Labor Board was not the actual increase of wages but a necessary preliminary does not make unilateral action, accompanied by publication of the step taken to the employees, any the less objectionable. The application to the War Labor Board marked a unilateral determination by the Company that the employees of this unit should have the specific increase deemed due them by the Company or none at all, if the bargaining agent should object in accordance with the letter quoted above. The employer was not getting into position to negotiate with the agent. He declared the contrary and proposed that he, as employer, would make the increase if permission were granted.

Two national labor groups had each separately sought for months to organize the Company. One effort to secure the designation of a unit had failed. The present designation was made over the protests of the Company. It had urged in its motion for reconsideration of the order of election:

> "There are two competing labor organizations seeking to organize the employees in this store. By this decision one of them is granted an election in the unit composed of two departments. There are some 350 departments in this store and if this Employer is to be confronted with elections and separate bargaining for each one or two departments it will be an endless and intolerable interference with store operations, which should not be permitted."

By going ahead with wage adjustments without negotiation with the bargaining agent, it took a step which justified the conclusion of the Board as to the violation of Section 8(1). Such unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent. If successful in securing approval for the proposed increase of wages, it might well, as the Board points out, block the bargaining representative in securing further wage adjustments.

It may be that the Company sought only to preserve its opportunity to contest the certification of the unit. It is pointed out that the increases for which approval was sought covered several thousand employees and that it is hardly conceivable that a general increase for so many would be sought to injure so few. But the Board's contention is not that the application, as a whole, was for the purpose of undermining the Council. Its conclusion was that the manner of presenting and publicizing the application had the effect of coercing the employees. Instead of taking up the increase of this unit's wages with the Council, filing a joint application, with reservation of the Company's legal right to challenge the certification of the bargaining agent when any complaint might be filed for refusal to barg[illegible] collectively, or, omitting the employees of the questioned unit, if the Council would not join in such an application, the Company chose to ignore the properly certified agent. Nor can we agree that if, under the procedure suggested, the employees in this unit had been omitted from the employees who received increases, there would have been danger that the National Labor Relations Board would have considered such omission an unfair labor practice. Whatever weight an omission might have, under other circumstances, under these it would have followed an effort to avoid injury to the employees and could not properly be held an interference with their rights.

We find no basis for eliminating the announcements or the publication from consideration on the ground that they were an exercise of the right of free expression, secured by the First Amendment. They are a part of the totality of Company activities and were properly received by the Board as evidence of the unilateral action of the Board. *Labor Board* v. *Virginia Power Co.*, 314 U. S. 469, 477.

Breadth of Order. Petitioner complains here of the refusal of the Court to modify paragraph 1(b) of the Board's order to the extent which petitioner explicitly asked for below in its petition for rehearing.[5] That paragraph, together with another which enjoins refusal to bargain, is set out below.[6] Petitioner argues

[5] Section 10(e) of the National Labor Relations Act, 49 Stat. 454, precludes the consideration by the Circuit Court of any objection not raised before the Board, unless such failure is excusable because of "extraordinary circumstances." This Court therefore is authorized, *sua sponte*, to appraise the record to determine the power of the Circuit Court to review paragraph 1(b) of the Board's order. Board v. Bradford Dyeing Assn., 310 U. S. 318, 341.

In this proceeding the paragraph first appeared in the intermediate report of the Board's examiner. The petitioner excepted specifically to paragraph 1(b) of the proposed order as "not supported or justified by the record." This was the only objection made to the paragraph in question in the record of the proceedings before the Board. The examiner's recommendation was adopted by the Board in its order. Unless this objection was sufficiently specific to apprise the Board of the question now presented, the Circuit Court had no power to consider it. Marshall Field & Co. v. Board, 318 U. S. 253. In the Marshall Field case we declined to consider an issue as to the power of the Board to grant a back pay order which was construed as barring the deduction of unemployment compensation from the award, although the question was raised by answer and decided by the Circuit Court of Appeals, National Labor Relations Board v. Marshall Field & Co., 129 F. 2d 169. Our reason for refusing review was that the only objection to the Board's power was error by the examiner "in making each and every recommendation." The remedy recommended by the examiner was the usual back pay less earnings without any word in the report as to the unemployment compensation. This was too general to apprise the Board of an intention to bring up the question of the deductibility of the compensation and of the necessity for findings.

Although it falls short of desirable specificity, we think the objection was sufficient in the present case. No further findings are needed. The paragraph in issue is a standard form of order frequently used by the Board; the same question with respect to an almost identical order was considered by this Court in Labor Board v. Express Pub. Co., 312 U. S. 426, and has been a frequent subject of dispute in the Circuit Courts (see n. 10 *infra*). These circumstances coupled with an objection that the order was "not supported or justified by the record" put the Board on notice of the issue now presented.

[6] Decreed that May Department Stores Company, etc., shall: "1. Cease and desist from: (a) Refusing to bargain collectively with St. Louis Joint Council, United Retail & Department Store Employees of America, affiliated with the Congress of Industrial Organizations, as the exclusive representative of all its employees at its St. Louis store engaged in the bushelling room,

that the broad, blanket provisions of 1(b) are invalid, even though, of course, restricted to the few employees in the affected unit. The language of the prohibition covers interferences with all the rights of these employees which are secured by section 7 of the Labor Act, while at the most, petitioner urges, the Board has found and the Circuit Court sustained only two unfair labor practices by petitioner, "(1) refusal to bargain and (2) the storewide salary increase." Both of these, it is asserted, are but incidents in petitioner's effort to obtain judicial review of the Board's certification. As the Board's selection of an appropriate unit to choose the employees' bargaining representative and the Board's subsequent certification of the representative chosen, section 9, is not judicially reviewable directly, petitioner takes the position that it committed the unfair labor practice of refusing to bargain with an accredited union, merely to open the way for judicial review of the certification.[7] Consequently petitioner urges the cease and desist order should be no broader than the refusal to bargain which is covered by paragraph 1(a), note 6 *supra*, with the addition of "or from any other acts in any manner interfering with the representative's efforts to negotiate." The suggested addition is taken from the *Express Publishing Company* case, 312 U. S. at 438. Thus the breadth of paragraph 1(b) of the Board's order is sharply challenged as being beyond the power of the Board in view of the evidence and findings in this case.

The scope of injunctions which follow National Labor Relations Board determinations is important to employer and employee. While contempt proceedings can be instituted only by the Board and in the public interest,[8] the possibility of contempt penalties

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second floor, department 280, and in the busheling room, basement, department 281, including regular extra employees in these departments, but excluding the two foremen and all other employees of the respondent;

"(b) In any other manner interfering with, restraining, or coercing its employees who are referred to in paragraph 1(a) in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act."

[7] See American Federation of Labor v. National Labor Relations Board, 308 U. S. 401; Pittsburgh Plate Glass Co. v. National Labor Relations Board, 313 U. S. 146; Inland Empire Dist. Council etc. v. Millis, 325 U. S. — [65 S. Ct. 1316].

[8] Amalgamated Workers v. Edison Co., 309 U. S. 261, 269.

by the court for future Labor Act violations adds sufficient additional sanctions to make material the difference between enjoined and non-enjoined employer activities.[9] The decision in the *Express Publishing Company* case emphasized this issue.[10] The paragraph under attack in that case was substantially like the paragraph here attacked.

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[9] See for business operations under contempt orders 47 Columbia L. Rev. at 913.

[10] The problem of the scope of injunction dealt with in National Labor Relations Board *v.* Express Publishing Co., 312 U. S. 426, has recently received careful consideration by judges and writers. 41 Columbia L. Rev. 911; 29 Georgetown L. J. 1026; [illegible] Harvard L. Rev. 472; 23 Boston University L. Rev. 447; 54 Yale L. J. 1[illegible]

Illustrative of the decisions in the Circuit Courts are the following cases:

1. National Labor Relations Board

(a) *Upholding a general § 8(1) order on the basis of a single unfair labor practice (the nature of the unfair practices is given in brackets):*

Labor Board *v.* Highland Park Mfg. Co., 110 F. 2d 632 (C. C. A. 4) [§ 8(5)]; Art Metals Const. Co. *v.* Board, 110 F. 2d 148 (C. C. A. 2) [§ 8(5)]; Wilson & Co. *v.* Board, 124 F. 2d 845 (C. C. A. 7) [§ 8(3)]; Labor Board *v.* Sunbeam Electric Mfg. Co., 133 F. 2d 856 (C. C. A. 7) [§ 8(1)] Labor Board *v.* Standard Oil Co., 138 F. 2d 885 (C. C. A. 2) [§ 8(2)].

(b) *Upholding a general § 8(1) order where there was more than one unfair practice:*

Labor Board *v.* Boss Mfg. Co., 107 F. 2d 574 (C. C. A. 7) [§§ 8(1), 8(3), 8(5)]; Labor Board *v.* Reed & Prince Mfg. Co., 118 F. 2d 874 (C. C. A. 1) [§§ 8(1), 8(3), 8(5)]; F. W. Woolworth Co. *v.* Board, 121 F. 2d 658 (C. C. A. 2) [§§ 8(1), 8(3)]; Board *v.* Algoma Net Co., 124 F. 2d 730 (C. C. A. 7) [§§ 8(1), 8(3)]; Labor Board *v.* Baldwin Locomotive Works, 128 F. 2d 39 (C. C. A. 3) [§§ 8(1), 8(2), 8(3), 8(4)]; Labor Board *v.* Brezner Tanning Co., 141 F. 2d 62 (C. C. A. 1) [§§ 8(1), 8(3)]; Idaho Potato Growers *v.* Board, 144 F. 2d 295 (C. C. A. 9) [§§ 8(3), 8(5)].

(c) *Limiting a § 8(1) order based on a single unfair labor practice to acts specifically condemned:*

Globe Cotton Mills *v.* Board, 103 F. 2d 91 (C. C. A. 5) [§ 8(5)] Labor Board *v.* Swift & Co., 108 F. 2d 988 (C. C. A. 7) [§ 8(2)]; McQuay-Norris Mfg. Co. *v.* Board, 119 F. 2d 1009 (C. C. A. 7) [§ 8(5)]; Labor Board *v.* Newark Morning Ledger Co., 120 F. 2d 262 (C. C. A. 3) [§ 8(3)]; Labor Board *v.* Burry Biscuit Corp., 123 F. 2d 540 (C. C. A. 7) [§ 8(2)]; Labor Board *v.* Stone et al., 125 F. 2d 752 (C. C. A. 7) [§ 8(1)]; Commonwealth Edison Co. *v.* Board, 135 F. 2d 891 (C. C. A. 7) [§ 8(2)]; Consolidated Aircraft Corp. *v.* Board, 141 F. 2d 785 (C. C. A. 9) [§ 8(1)]; Labor Board *v.* Walt Disney Productions, 146 F. 2d 44 (C. C. A. 9) [§ 8(3)]; Labor Board *v.* Lipshutz, 149 F. 2d 141 (C. C. A. 5) [§ 8(1)].

(d) *Limiting a § 8(1) order where there was more than one unfair labor practice:*

Press Co., Inc. *v.* Board, 118 F. 2d 937 (App. D. C.) [§§ 8(1), 8(3)]; Labor Board *v.* Grower-Shipper Vegetable Assn., 122 F.

The test of the proper scope of a cease and desist order is whether the Board might have reasonably concluded from the evidence that such an order was necessary to prevent the employer before it "from engaging in any unfair labor practice affecting commerce." Section 10(a).[11] Equity has long been accustomed in other fields to reach conclusions as to the scope of orders which are necessary to prevent interferences with the rights of those who seek the courts' protection.[12] Injunctions in broad terms are granted even in acts of the widest content, when the court deems them essential to accomplish the purposes of the act.[13] We think that the Board has the same power to determine the needed scope

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2d 368 (C. C. A. 9) [§§ 8(1), 8(3)]; Wilson & Co. *v.* Board, 123 F. 2d 411 (C. C. A. 8) §§ 8(1), 8(2), 8(3)]; Labor Board *v.* Servel, Inc., 149 F. 2d 542 (C. C. A. 7) [§§ 8(1), 8(3)].

2. Office of Price Administration.

A similar situation prevails with respect to the use of injunctions to restrain violations of regulations issued under the Emergency Price Control Act, 56 Stat. 23.

(*a*) *Sustaining general injunctions on the basis of particular violations of a regulation:*

Bowles *v.* Montgomery Ward & Co., 143 F. 2d 38 (C. C. A. 7) [preliminary injunction against violation of any price regulation for violation of several provisions of one regulation sustained].

(*b*) *Sustaining limited injunctions:*

Bowles *v.* Town Hall Grill, 145 F. 2d 680 (C. C. A. 1) [violation of restaurant ceiling prices on poultry, lobster, gin items; injunction limited to such items sustained]; Bowles *v.* Sacher, 146 F. 2d 186 (C. C. A. 2) [sustaining preliminary injunction limited to particular type of violation proved].

3. Federal Trade Commission

(*a*) *Enforcing or affirming order broader than specific acts complained of:*

Ostler Candy Co. *v.* F. T. C., 106 F. 2d 962 (C. C. A. 10); Hershey Chocolate Corp. *v.* F. T. C., 121 F. 2d 968 (C. C. A. 3); Eugene Dietzgen Co. *v.* F. T. C., 142 F. 2d 321 (C. C. A. 7).

(*b*) *Limiting orders to specific acts:*

F. T. C. *v.* Beechnut Packing Co., 257 U. S. 441; F. T. C. *v.* A. McLean & Son, 84 F. 2d 910 (C. C. A. 7); Helen Ardelle, Inc. *v.* F. T. C., 101 F. 2d 718 (C. C. A. 9).

11 Ethyl Gasoline Corp. v. United States, 309 U. S. 436, 461; Union Pacific R. Co. *v.* United States, 313 U. S. 450, 470; United States *v.* Bausch & Lomb Co., 321 U. S. 707, 724.

12 Hecht Co. *v.* Bowles, 321 U. S. 321, 328; Wyoming *v.* Colorado, 286 U. S. 494, 508.

13 Sherman Act—Standard Oil Co. *v.* United States, 221 U. S. 1, 77:

"It may be conceded that ordinarily where it was found that acts had been done in violation of the statute, adequate measure of relief would result from restraining the doing of such acts in the future. *Swift* v. *United States*, 196 U. S. 375. But in a case like this, where the condition which has been brought about in violation of the statute, in and of itself, is not only a continued attempt to monopolize, but also a monopolization, the duty to

of cease and desist orders under the National Labor Relations Act that courts have, when authorized to issue injunctions, in other litigation.

That power of the Board is subject to review under Section 10. While the Board has been delegated initially the exclusive authority to prevent unfair labor practices,[14] courts, which are called upon to enforce such orders by their own decrees, may examine its scope to see whether on the evidence they go so beyond the authority of the Board as to require modification as a matter of law before enforcement. Section 10(a) and (e). The *Express Publishing Company* case declared:

> "To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past." P. 437.

We think that, in the circumstances of this proceeding, although there is a violation of Section 8(1) as well as 8(5), the violation

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enforce the statute requires the application of broader and more controlling remedies."

"So far as the owners of the stock of the subsidiary corporations and the corporations themselves were concerned after the stock had been transferred, § 6 of the decree enjoined them from in any way conspiring or combining to violate the act or to monopolize or attempt to monopolize in virtue of their ownership of the stock transferred to them, and prohibited all agreements between the subsidiary corporations or other stockholders in the future, tending to produce or bring about further violations of the act." P. 79.

"We so think, since we construe the sixth paragraph of the decree, not as depriving the stockholders or the corporations, after the dissolution of the combination, of the power to make normal and lawful contracts or agreements, but as restraining them from, by any device whatever, recreating directly or indirectly the illegal combination which the decree dissolved." P. 81.

Local 167 *v.* United States, 291 U. S. 293, 299:

"Appellants seek elimination of the provision of the decree that enjoins them from using any of the offices or positions in Local 167 or the shochtim union 'for the purpose of coercing marketmen to buy poultry, poultry feed, or other commodities necessary to the poultry business from particular sellers thereof.' The United States is entitled to effective relief. To that end the decree should enjoin acts of the sort that are shown by the evidence to have been done or threatened in furtherance of the conspiracy. It should be broad enough to prevent evasion. In framing its provisions doubts should be resolved in favor of the Government and against the conspirators. *Warner & Co.* v. *Lilly & Co.*, 265 U. S. 526, 532. . . . When regard is had to the evidence disclosing the numerous purposes of the conspiracy and the acts of coercion customarily employed by defendants, it is plain that the clause referred to cannot be condemned as unnecessary or without warrant."

See Amer. Foundries *v.* Tri-City Council, 257 U. S. 184, 194.

[14] S. Rep. No. 573, 74th Cong., 1st Sess., p. 15; H. Rep. No. 1147, 74th Cong., 1st Sess., p. 23.

8(1) is so intertwined with the refusal to bargain with a unit erted to be certified improperly that without a clear deter- ination by the Board of an attitude of opposition to the purposes the Act to protect the rights of employees generally, the decree d not enjoin Company actions which are not determined by Board to be so motivated.

This conclusion requires a modification of the decree so that injunction will not apply generally to all violations under the of the rights of the employees in Departments 280 and 281, will apply to other interferences, in violation of Section 8(1) otherwise, with the Council's representation of these employees. ere should be added to paragraph 1(a) of the decree, note 6 *ra*, the following clause, "or from any other acts in any manner erfering with the representative's efforts to negotiate for or resent the above named employees as bargaining agent." Para- ph 1(b) should be stricken. Textual corrections should be made onform to these changes. As thus modified, the decree is

Affirmed.

Mr. Justice JACKSON took no part in the consideration or de- on of this case.

SUPREME COURT OF THE UNITED STATES.

No. 39.—October Term, 1945.

May Department Stores Company, Doing Business as Famous-Barr Company, Petitioner, *vs.* National Labor Relations Board.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[December 10, 1945.]

Mr. Justice Rutledge, concurring in part.

I cannot agree, as the Court seems to say and the Labor Board found,[1] that there were two unfair practices in this case, (1) refusal to bargain, contrary to § 8(5); and (2) interference, restraint and coercion of employees in violation of § 8(1). I think only one unfair labor practice was shown; namely, refusal to bargain; and for that reason I think the Board's order must be modified to eliminate the restraints based on its finding of violation of § 8(1) as the *Express Publishing Company* case, 312 U. S. 426, requires in such a situation.

I am unable to understand the majority's application of that case to a situation in which the Board has found there were two different and substantial violations of the Act. The Court does not hold to the contrary or rule that either finding was unsupported by the evidence. Rather it seems to approve and sustain both. Yet it modifies, as I think ambiguously,[2] the relief which

[1] The Board adopted the trial examiner's intermediate report without change, the employer not having applied for oral argument. 53 N. L. R. B. 1366. After reviewing the evidence under the separate headings of "A. The refusal to bargain" and "B. Interference, restraint and coercion," the report found as to the former that "on July 19, 1943, and at all times thereafter" the company had refused to bargain collectively with the union; as to the latter "that, by its unilateral action in seeking approval of its proposed wage adjustments," and by later publicizing this action, it had "interfered with, restrained and coerced its employees" in the exercise of the rights guaranteed in §7. There were separate and independent conclusions of law based on these findings, to which the separate provisions of the order related.

[2] The modification directed by the Court, if it is more than a change in the form of words used in Paragraph 1(b) of the Board's order, necessarily cuts down the substance of the order. But since the injunction will apply "to other interferences, in violation of Section 8(1), or otherwise, with the Council's representation" of employees in Departments 280 and 281, and

the Board found appropriate to prevent a repetition of the interference, coercion and restraint it determined had been inflicted upon the employees, in addition to the refusal to bargain. The *Express Publishing* case covers no such situation. It was limited to one where the Board had imposed both types of restraint upon a finding only of refusal to bargain.[3]

It is apposite to inquire therefore whether that case has now been expanded to forbid the Board to impose both types of restraint where it has found both kinds of violation and neither finding is overturned. If so, I think the result squarely conflicts with repeated decisions, reflected in the language of the opinion in the *Express Publishing* case itself, that "having found the acts which constitute the unfair labor practice the Board is free to restrain the practice and other like or related unlawful acts." 312 U. S. 426, 436.[4]

It is important for the administration of the Act to know whether the Board is to be free to adapt the remedy to fit the evil it has found to exist, as the statute commands, § 10(c); or, on the contrary, its remedy thus adapted may be stricken down or modified although the finding which justifies it is approved. That in my judgment goes beyond correction of abuse of the Board's

since violation of § 8(1) includes interference, restraint or coercion of employees' rights as guaranteed by § 7, it is difficult to understand in just what particulars the order has been modified. In the absence of more definite specification we must accept the Court's modification as meaning that some substantial change from the order's terms is intended.

[3] Under the ruling the Board is not free to utilize § 8(1) as a device for multiplying an unfair practice under § 8(5), so that the single act of refusing to bargain may be made to justify an order forbidding not only that conduct but also the numerous types of unfair practice prohibited by the broad language of § 8(1). The gist of the decision was that the Board cannot thus pile unfair practice on unfair practice, like presumption on presumption, for purposes of enforceable relief, notwithstanding the act of merely refusing to bargain may be held technically to violate both sections in view of the language of § 7. National Labor Relations Board v. Express Publishing Co., 312 U. S. 426, 433.

[4] This Court has, in various contexts, declared that the particular means by which the effects of unfair labor practices are to be expunged is for the Board and not for the courts to determine. Virginia Electric & Power Co. v. National Labor Relations Board, 319 U. S. 533, 539; National Labor Relations Board v. Link-Belt Co., 311 U. S. 584, 600; International Association of Machinists v. National Labor Relations Board, 311 U. S. 72, 82. See National Labor Relations Board v. Bradford Dyeing Association, 310 U. S. 318, 342-343. And the Court has said that "the relation of remedy to policy is peculiarly a matter for administrative competence" and that "courts must not enter the allowable area of the Board's discretion. . . . ." Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177, 194. See also Regal Knitwear Co. v. National Labor Relations Board, 324 U. S. 9, 13.

discretion and substitutes the Court's judgment for the Board's in devising the appropriate remedy.

For this reason it becomes important to state the different reasons why I think the order should be modified to eliminate any restraint based upon the finding of violation of §8(1). It is not because this Court has power or discretion, when there are two substantial and different unfair practices, to modify the Board's order by restricting the relief to what is appropriate to prevent repeating only one or by other modification to eliminate relief appropriately designed by the Board to prevent repetition of unfair practices it has found to exist. It is because, in my opinion, there was only one unfair practice and that was the refusal to bargain. Hence I think the *Express Publishing* case exactly applies and does so without necessity for extending the scope of its ruling as the Court's application appears to do.

In my judgment an employer does not commit an unfair labor practice when he does no more than exercise rights secured by the Federal Constitution and laws, including the Wagner Act.[3] That Act does not put him to the choice of giving up his rights or exercising them on pain of being found guilty of unfair practice. Apart from the evidence relating to refusal to bargain under §8(5), there was nothing, in my opinion, which went beyond what was necessary to exercise or preserve the employer's rights secured by law. The application to the War Labor Board; for approval of the proposed weekly increase of $2.00 for all the St. Louis employees, except those represented by recognized unions, was made August 31, 1943, shortly after the company had declined to bargain with the union in order to preserve its right to contest appropriateness of the unit. Announcements of this action over the public address system followed on September 1 and 11, with one also in "Store Chat" on September 3.

In the background of the facts, I do not think these acts amounted to more than the exercise of legal rights secured to the employer by the Wagner Act, the Stabilization Act and the First Amendment. They constituted neither a wage increase nor an offer of one. There was no more than taking steps to secure official approval, required in advance by the Stabilization Act, to

[3] The Wagner Act, designed to promote the public interest by securing employees' rights, does so by appropriate remedies which also afford protections for the employer. See text at note 13.

make an increase, or tender one, at some uncertain future date, possibly never to arrive. The application was merely a necessary preliminary step to later action, which might or might not materialize, in the nature of dealing with employees or offering to do so, whether directly or through their bargaining representatives.

The case therefore is not *Medo*,[6] in spite of the Board's repeated and insistent argument to the contrary. There the employer actually dealt with the employees, not only negotiating but contracting with them. So in *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332. Here there was neither negotiation nor contracting. There was nothing the employer could offer at that time or the employees then could accept. There was only preparatory action looking to the possibility of later negotiations, and announcement of this action to the employees.

If the employer had the right to put itself legally in position to negotiate, either with the employees or with the union, it also had the right to state what it had done. The effect of the Board's decision, and now apparently of the Court's, is to rule that the Wagner Act so circumscribes an employer that he cannot take the necessary preliminary steps, in this case required by law, to place himself in position to undertake bargaining with his employees, whether directly or through their selected representatives. It is further to hold that if he takes such steps, without having first secured the union's permission, he must keep the fact to himself and dare not disclose to his employees what is to all others a matter of public record. This goes beyond protecting the rights of employees. It gives to the union a veto on management, not only as respects negotiations for terms of employment but for putting the employer in position to negotiate. No case here has gone so far and in my judgment the Wagner Act does not contemplate that any should do so.

Other facts bear out this conclusion. One is that the Board made no finding that the employer's action was taken with intent to interfere with, restrain or coerce the employees in respect to their rights. Naturally enough there was no such finding. The application affected some 4500 employees. The unit involved only

[6] Medo Photo Supply Corp. *v.* National Labor Relations Board, 321 U. S. 678.

about 30. It is hardly conceivable that the employer would have taken this step in relation to so many for the purpose of coercing, interfering with or restraining 30. There is lacking therefore any showing or finding of intent, a factor the courts have considered important in concluding from otherwise innocent or equivocal facts that unfair practice may exist;[7] and one which in this case the Court apparently makes crucial to determine whether relief relevant to a finding of unfair practice may be sustained. The Board found only that the employer's "unilateral action," in making the application to the War Labor Board and in announcing this fact "*had the effect* of depriving the Union of credit which normally would accrue to it, and of nullifying its efficacy as a bargaining agent." (Emphasis added.)

Even were this true, it has not heretofore been held that the Wagner Act forbids an employer to take any preliminary step whatever looking toward dealing with his employees in the future which, though not intended to discredit the union, may have the effect to prevent it from obtaining some credit for proposing possible future action which in fact the employer has proposed. Nothing in the Act requires an employer to maintain a union's prestige or to give it credit for originating all proposals which may have some future effect upon his relations with his employees. Section 8 (1) forbids interference, coercion and restraint upon employees, in the exercise of their rights, not the mere failure of the employer to magnify the union's influence.

Moreover the Board made no finding, presumably because there is no evidence to sustain one, of particular and concrete facts showing that the employer's so-called "unilateral action" adversely affected the union's status among its members or other employees.[8] It only concluded that the action "reasonably [may] be said to have undermined the Union . . . and to have

[7] See Montgomery Ward & Co. *v.* National Labor Relations Board, 107 F. 2d 555, 559; National Labor Relations Board *v.* Whittier Mills Co., 111 F. 2d 474, 478-479; National Labor Relations Board *v.* Elkland Leather Co., 114 F. 2d 221, 224; National Labor Relations Board *v.* Chicago Apparatus Co., 116 F. 2d 753, 756-757; Peter J. Schweitzer, Inc. *v.* National Labor Relations Board, 144 F. 2d 520, 522.

[8] The general "finding" that the company's action in making the application and publicizing it "interfered with, restrained, and coerced its employees," 53 N. L. R. B. at 1371, rested on no more than the Board's assertion that "it logically follows" that these acts "had the effect" of depriving the union of credit, and "may . . . be said to have undermined" it.

discouraged employees generally in their union affiliation." Presumably, since no such effects were proved or found specifically, the basis for this conclusion was the Board's "experience," though this was not referred to in the order or the report on which it was founded. That foundation was not sufficient, in my judgment, in the absence of proof of more unequivocal acts of unfair practice, of any finding of intent to interfere, restrain or coerce, and of any showing whatever of specific discouraging or undermining effects. Something more than supposition should underlie a conclusion which supports a finding of unfair practice.

Nor did the employer ignore the union's possibly legitimate status or its right to have a voice in the matter of the increase, if approval by the War Labor Board should materialize. The application set forth the essential facts with reference to the existing dispute concerning appropriateness of the unit, the employer's intention to litigate the question whenever it might, its nonrecognition of the union pending the obtaining of a decision, and its purpose for these reasons to include the affected employees in the application. But the application went on to say that if the union should object to the increase, for Departments 280 and 281, the Board should consider it as amended to exclude those employees.[9]

This hardly furnishes ground for concluding that the employer was attempting to "short-circuit" the union, undermine it, or discredit it with the employees. It explicitly recognized that the union, if rightly designated and certified, was entitled to say whether or not the proposed change in pay should become effective. Actually, that right was conceded, regardless of the ultimate outcome of the issue on validity of the certification.[10] Clearly, in view of this concession, there was no effort either to contract with the employees directly or to deal with them, over the union's head, about the increase. Whether or not it should become effective as to them was left, not to the employees themselves, but to the sole and exclusive judgment of the union. There was therefore no semblance of the short-circuiting or direct dealing with employees which was present in both the *Medo* and the *J. I. Case* decisions.

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[9] The Board's brief states that the union objected and the War Labor Board accordingly eliminated the bushelmen from the application, citing In re May Dept. Stores Co., N. W. L. B. Case No. 7-6585 (unreported).

[10] See note 11.

Possibly for this reason the Board is driven back to its "undermining" contention. The company, it says, by including these employees, "put the union on the spot," so that it had no real choice. The argument shows concern for the union's "spot," but gives no recognition to the employer's. The Board does not urge that the company should have excluded these employees from the general application, with good reason. Had this been done, obviously the company would have laid itself open to a charge and a finding of unfair practice under § 8(1). The Board is unwilling, apparently, to put the employer in that dilemma. Cf. *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678, 699. It does not say, though the Court does by way of dictum, that excluding these employees from the application would not have been an unfair practice. The Board says the employer's only way out was to consult the union before making the application.

This can only mean that the employer was compelled to ask the union's permission to include these employees; in short, that the union had the right under the Wagner Act to veto any action taken by the employer to obtain the necessary legal authority to propose any increase for them, whether directly or through the union. I do not think the Wagner Act confers such a power on the union. Nor did the Stabilization Act or the regulations in effect pursuant to its provisions do so.[11] Moreover, the employer asserts that it could not refer the matter to the union without surrendering the very rights it was seeking to preserve. This, it says, would have amounted to recognition and would have foreclosed it later from securing review under the terms of § 10 upon the question whether the unit was appropriate.

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[11] The regulations required that the application be signed "either (a) jointly by the employer and a duly recognized collective bargaining agency . . . , or (b) by the employer alone." 4 War Labor Rep. xxxi, xxxiii-xxxiv, III, 3. It was further required, in either case, that the application state whether or not there was "a duly recognized collective bargaining agency . . which has not joined with the employer in the application." If so, provision was made for the Wage and Hour Division to notify the organization and request it to inform the office of objections, if any, to action on the application. Cf. note 9. If none were made, the application would be acted on. If made, the matter was to be treated as a dispute and referred to the Conciliation Service of the Department of Labor.

It was apparently in compliance with this regulation that the application in this case set forth the representations concerning the nonrecognition of the union, the dispute, etc. The regulations were amended later to include either a recognized or a certified union. 9 War Labor Rep. xxxiii; 8 Fed. Reg. 16678.

Whether or not that is true, there was certainly good reason to believe it so. The right to review is given in terms only as an incident of an unfair practice proceeding. § 10; cf. *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401; *Inland Empire Dist. Council* v. *Mills*, 325 U. S. —. In this state of the law, the company's only certain remedy was to withhold recognition until the matter could be determined. Had it recognized the union, by seeking its permission to include the affected employees, there would have been no factual or legal basis for the only proceedings by which review was assured; and, in order to secure it, the company then would have been forced to commit some other act of unfair practice or to take its chance upon some other doubtful remedy. In either event, it would have been confronted with its prior action of dealing with the union and the possibilities this would present either for applying the broad doctrine of estoppel or for occupying the inconsistent, not to say indefensible, position of having recognized the union and then having deliberately repudiated the recognition.

I do not think the Wagner Act was intended to put the employer in such a dilemma. It has been settled that he takes the risk of his error when he mistakenly judges that the unit is not appropriate or for other reason that the duly selected or certified union is not entitled to recognition.[12] As to that, the employer's choice was hard, made so by the very state of the law. Had the law been that certification was none of the company's business and that the company had *no* right of review, it would have known its rights and its liabilities. That was not and is not the law. The company was told expressly that it had a right of review, but only in an unfair practice proceeding.[13] It was therefore put to the choice, by the statute's terms, of foregoing review or having it by an act of unfair practice. Hence the finding of unfair practice by refusal to bargain

[12] See, e. g., National Labor Relations Board v. Hearst Publications, 322 U. S. 111; Franks Bros. Co. v. National Labor Relations Board, 321 U. S. 702; Medo Photo Supply Corp. v. National Labor Relations Board, 321 U. S. 678; J. I. Case Co. v. National Labor Relations Board, 321 U. S. 332; Pittsburgh Plate Glass Co. v. National Labor Relations Board, 313 U. S. 146; National Labor Relations Board v. Bradford Dyeing Ass'n, 310 U. S. 318; National Licorice Co. v. National Labor Relations Board, 309 U. S. 350; cf. H. J. Heinz Co. v. National Labor Relations Board, 311 U. S. 514, 523 (employer bargained but refused to sign written contract).

[13] The attenuated character of the right makes all the more essential that it not be whittled away or nullified by rulings which make its exercise more precarious than it is by the very conditions of its existence.

must be sustained. But, in taking this risk, the employer did no more than it was compelled by law to do to save its rights under the Wagner Act and to avoid being found guilty, by virtue of some alternative course of conduct relating to the application, of further unfair practices.

I do not agree therefore that this necessitous action amounted to an additional unfair practice, in the nature of interference, coercion or restraint of employees' rights, whether or not the finding that it was is sufficient to sustain an independent provision for relief.

A word remains to be said concerning the announcements. As has been stated, if the company had the right to make the application as it did, it also had the right to announce that fact to the public and to the employees, so long as in doing this it did not do so with intent or in a manner to violate the Act. I find nothing in the announcements to justify a finding they were made with this purpose or effect, and there is no finding to the contrary.[14] They were, in my judgment, no more than an exercise of the employer's rights of free speech and a free press, secured by the First Amendment. Cf. *National Labor Relations Board* v. *Virginia Elec. & Power Co.*, 314 U. S. 469; *National Labor Relations Board* v. *Ford Motor Co.*, 114 F. 2d 905; *National Labor Relations Board* v. *American Tube Bending Co.*, 134 F. 2d 993; compare *Texas & N. O. Ry.* v. *Brotherhood*, 281 U. S. 548, 568.

It follows from my view of the case that the Board's order should be modified by striking from it Paragraph 1(b) together with the words "and (b)" from Paragraph 2(b), and as so modified enforced. Accordingly, I think the judgment of the Court of Appeals, enforcing the Board's order, should be modified in these respects and, as thus modified, affirmed.

The CHIEF JUSTICE and Mr. Justice FRANKFURTER join in this opinion.

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[14] The mere fact that the announcements omitted specific reference to Departments 280 and 281 does not supply this element. Such a reference, if made, might have been construed, by its singling out of this unit for special treatment and thereby for invidious implication, as furnishing the very evidence of wrongful specific intent and effect which the Board has failed to find.